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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE FORMAL COMPLAINT OF SWING FIRST GOLF LLC AGAINST JOHNSON UTILITIES LLC	DOCKET NO. WS-02987A-08-0049 **RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

Swing First Golf LLC ("Swing First") hereby responds to the December 4, 2008, Motion for Summary Judgment ("Motion") filed by Johnson Utilities Company ("Utility"). Effectively, Utility's defense is that if it made illegal promises, the remedy should be for the Commission to punish Utility's innocent customer. Further Utility's motion is not timely. Discovery is not yet completed and many of the issues raised in Swing First's complaint will be considered in Utility's pending rate case, Docket No. WS-02987A-08-0180. However, even at this early stage, Swing First demonstrates that there are genuine issues of material fact concerning all subjects of Utility's Motion.

Given the pendency of that docket and the many interlinking issues between the two dockets, the appropriate response would be to continue this complaint docket until the rate case docket is completed.

Swing First's response is supported by the following attached documents:

1. Memorandum of Points and Authorities;
2. Counterstatement of Facts;
3. Affidavit of David Ashton, Swing First's manager;
4. Rule 56(f) Affidavit of Craig Marks, Swing First's counsel;
5. Swing First Motion to Compel – Docket No. WS-02987A-08-0180; and
6. Superior Court Docket CV2008-000014, May 27, 2008, Minute Order.

Arizona Corporation Commission
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MEMORANDUM OF POINTS AND AUTHORITIES

I THE MOTION IS UNTIMELY

It is far too early in this case for a summary judgment motion: "A motion for summary judgment should not be granted when there is a genuine issue of material fact and it is not a substitute for a trial. ... Litigants are entitled to the right of trial where there is the slightest doubt as to the facts."[1] Yet, we have only begun to ascertain the facts in this case.

Summary Judgment is clearly not appropriate before a party has had the opportunity to complete discovery. Swing First is still conducting discovery in this docket and the rate case docket, which Utility has been doing everything in its power to resist.

On April 11, 2008, Swing First tendered its first data requests to Utility. On April 25, 2008, Utility responded by e-mail to Swing First's data requests by objecting to each question and providing none of the requested data. Utility's stonewalling of Swing First required Swing First to file a Motion to Compel on May 2, 2008. Utility's May 13, 2008, Reply to Motion to Compel continued its stonewalling.

On June 18, 2008, Administrative Law Judge Yvette B. Kinsey ordered Utility to provide the majority of the requested information.[2] She provided a very generous August 15, 2008, deadline for Utility's responses.[3] Utility simply ignored this deadline. It did not complete its responses until October 7, 2008, almost six months after it received the data requests.

In the rate case docket, Swing First has attempted discovery and been met with the same stonewalling tactics. Many of the rate case issues relate to those in this docket, including Utility's apparent illegal transactions with its affiliates, and the applicability of the Superfund tax to customer bills. Utility's stonewalling required Swing First to file another Motion to Compel in the rate case docket. A copy of the rate case Motion to Compel is attached to this Response.

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[1] *Peterson v. Valley Nat. Bank of Phoenix*, 90 Ariz. 361, 362, 368 P.2d 317, 318 (Ariz., 1962); quoted with approval in *Orme School v. Reeves*, 166 Ariz. 301,305, 802 P.2d 1000, 1004 (Ariz., 1990).

[2] Tr. at 41-43.

[3] Tr. at 51.

The rate case Motion to Compel outlines the issues that Swing First intends to address in the rate case:

1. Given the already discovered illegal affiliate transactions between Johnson Utilities and Johnson International, Utility should be required to fund an independent audit of both companies' books over at least the last five years to discover all such transactions and determine the impact of such transactions on customers.

2. An independent management audit should be conducted at Utility's expense to determine whether Johnson Utilities is a fit and proper entity to continue to hold its certificate of convenience and necessity. This audit should investigate at least:

   a. Prior activities and fines related to George Johnson and the Johnson Group;

   b. Utility's continual discharges of raw sewage into the Queen Creek Wash and other environmental violations;

   c. Utility's illegal storage of sewage sludge on site;

   d. Utility's harassment of customers through defamation lawsuits;

   e. Other customer service issues.

   f. Utility's disregard of Commission statutes, rules, and orders.

   g. Utility's provision of free water to its affiliates.

   h. Other illegal transactions, if any, between Utility and its affiliates.

3. No wastewater rate increase should be allowed until the financial and management audits have been completed, and the Commission has been able to evaluate the results of the audits.

4. Utility should be fined for its blatant disregard of its public service obligations, environmental laws, and explicit Commission statutes, rules, and orders.

5. Utility's authorized return on equity should be reduced to further penalize it for its blatant disregard of its public service obligations, environmental laws, and explicit Commission statutes, rules, and orders.

6. Because of Utility's unauthorized delays in filing its rate case, Utility should immediately reduce its water rates to the level proposed in its direct testimony, after giving effect to the return-on-equity reduction. The rate reduction should be retroactive to December 2007 and Utility should refund all amounts collected above those rates until the date of the rate reduction. After a final Decision is issued, further refunds should be made, based on the rates set in that Decision.

7. Utility should refund all Superfund ("Water Quality Assurance Revolving Fund") taxes collected from its customers since March 4, 2002, the date of Decision No. 64598.[4]

[4] Rate Case Motion to Compel at 8-9.

Utility's stonewalling tactics have prevented Swing First from gathering evidence to fully support its complaint and rate case positions. Now, Utility is attempting through its Motion for Summary Judgment to end those efforts forever. This is improper.

Rule 56 of the Arizona Rules of Civil Procedure sets forth the requirements for a summary judgment motion. However, summary judgment is not available to a party that is not allowing discovery to take place. Rule 56(f) provides, in pertinent part:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Attached to this Response is an affidavit of counsel that Swing First cannot obtain facts essential to justify its opposition to the Motion for Summary Judgment.

II A MOTION FOR SUMMARY JUDGMENT MUST BE DENIED WHERE THERE ARE GENUINE ISSUES OF MATERIAL FACT

The purpose of a motion for summary judgment "is not to cut litigants off from their right of trial ...if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."[5] "In resolving the question as to whether summary judgment should be granted, the trial court does not weigh the evidence .... The pleadings affidavits, depositions and admissions, if any, must be viewed in the most favorable aspect they will bear in support of the right of the party opposing the motion to a trial of the issues.[6]

In this case, Swing First has submitted sufficient evidence by affidavit or other means to establish that there are genuine issues of material fact concerning each issue in this case. This is all that is required to deny a motion for summary judgment.

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[5] *Peterson v. Valley Nat. Bank of Phoenix*, 90 Ariz. 361, 363, 368 P.2d 317, 318 (Ariz., 1962), quoting *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir., 1940).
[6] *Id.*, 90 Ariz. at 363, 368 P.2d at 318.

In support of its Motion, Utility cites *Chantel v. Mohave Electric Coop.*, Docket No. E-01750A-04-0929, Decision No. 68592. This case is not persuasive. Swing First does not dispute that, in limited circumstances, the Commission can grant a motion for summary judgment. However, the circumstances seen in *Chantel* are not seen here. In *Chantel*, there was one very limited issue, whether the utility should execute a line-extension agreement on the terms requested by complainant. In this case, there are multiple issues, including what the proper charges to Swing First should have been over more than three years. In *Chantel*, there is an eight-page procedural history leading up to the dispositive motion for summary judgment. In this case, we are still very early in a proceeding that has featured Utility's six-month delay in answering Swing First's initial data requests. In *Chantel*, there is no hint that discovery had not been completed. In this case, we are early in the discovery process and Utility has strenuously resisted providing even rudimentary responses. In *Chantel*, complainant essentially offered no controverting facts in his affidavit. In this case, even at this early stage Swing First is offering substantial controverting facts concerning each material issue. *Chantel* does not support granting Utility's Motion for Summary Judgment.

III THE ADMINISTRATIVE LAW JUDGE CANNOT GRANT A MOTION FOR SUMMARY JUDGMENT

Chantel also points out one important distinction between Commission and court practice. The Administrative Law Judge cannot grant a motion for summary judgment. A motion for summary judgment is not a procedural motion, but a motion to finally resolve issues in a case. *Chantel* holds that it is up to the full Commission to determine whether to grant or deny a motion for summary judgment.

> Authority resides with the Commission, and not with an Administrative Law Judge, to make the final decision on complaints filed with the Commission, based on record evidence and legal analysis. Such decision-making authority includes authority to grant or deny a motion for summary judgment and whether to impose fines.[7]

[7] Decision No. 68592 at 14: 9-13.

Should the Administrative Law Judge wish to take dispositive action on Utility's Motion for Summary Judgment, the proper procedure would be to issue a Recommended Opinion and Order ("ROO") for the Commission's consideration at Open Meeting. Of course, the parties would have a full opportunity to except to the ROO and propose amendments for the Commissioners' consideration.

IV ALL ISSUES ARE WITHIN THE COMMISSION'S JURISDICTION

A The Commission May Interpret the Utility Services Agreement

Utility cites two very old cases that allegedly support its view that the Commission cannot interpret the Utility Service Agreement.[8] Both are inapposite, because neither case involved rates for utility service or even interpretations of contracts.

As admitted by Utility, *Trico* involved a seeking to void an option contract for the purchase of utility infrastructure. Clearly, this has nothing to do with utility rates and services. Similarly, in *General Cable*, plaintiff sought to void a take-or-pay clause in a contract obligating a utility to construct new facilities to serve plaintiff. Again, this is unrelated to utility rates and services.

Contrary to Utility's strained interpretation of *Trico* and *General Cable*, the law is now settled in Arizona that an administrative agency may interpret contracts in a manner ancillary to its regulatory powers. The leading case in this area, which Utility inexplicability fails to cite, is *J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 690 P.2d 119 (Ariz. App., 1984). In *Hancock*, a contractor argued that the Registrar of Contractors did not have jurisdiction to resolve a dispute over the interpretation of a contract. The court disagreed, holding that "the resolution of a bona fide contractual dispute, involving a licensed contractor, by the Registrar of Contractors ancillary to its regulatory mission does not violate [Constitution] article III."[9] The court went on to distinguish *Trico* and *General Cable*: "[T]he

[8] *Trico Electric Coop. v. Ralston*, 67 Ariz. 358, 363, 196 P.2d 470, 473 (1948); *General Cable Corp. v. Citizens Utilities Co.*, 27 Ariz. Ct. App. 381, 385, 555 P.2d 350, 354 (Ariz. Ct. App. 1976).
[9] 142 Ariz. at 406; 690 P.2d at 125.

language in both cases is dicta, as it pertains to the construction of a contract where its terms are disputed, since neither case involved a dispute as to the meaning of the contract."[10]

Hancock determined that the Registrar of Contracts had jurisdiction to resolve a contract dispute that was within its regulatory mission. If the Registrar of Contracts can resolve contract disputes, certainly the Corporation Commission—an agency with far greater authority and jurisdiction—can resolve contract disputes relating to the rates for services provided by a regulated utility.

The Corporation Commission is given broad authority in Arizona.[11] Within the sphere of its responsibilities, the Commission is empowered to exercise not only legislative but also judicial, administrative, and executive functions of government.[12] Under the state constitution, the Commission is granted "full power" to set just and reasonable rates by public service corporations and to "make reasonable rules, regulations, and orders, by which such corporations shall be governed in the transaction of business within the State...."[13]

Consistent with *Hancock,* and unlike either *Trico* or *General Cable*, this case requires interpretation of a contract – the Utility Service Agreement. As is evident from the pleadings, the parties disagree as to the meaning of the Utility Service Agreement. Additional evidence as to the intent of the parties, gathered through data requests and depositions, is needed to resolve the meaning.

Utility argues that Maricopa County Superior Court provides Swing First a "ready forum" to interpret the Utility Services Agreement, as part of in Docket CV2008-000014. Utility unaccountably ignores Judge Dunevant's May 27, 2008, Minute Order in that docket. A copy of the Minute Order is attached hereto. Judge Dunevant held that the dispute between the parties related to the Utility Services Agreement concerned the "'charge for, nature, and quality' of regulated water service provided by Johnson ... ." The Judge concluded that the court "should

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[10] 142 Ariz. at 408; 690 P.2d at 127 (emphasis added).
[11] *State v. Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. 294, 300, 138 P. 781, 783 (1914).
[12] *Id.* 15 Ariz. at 306, 138 P. at 786.
[13] Ariz.Const. Art 15, § 3.

refrain from becoming involved until the Corporation Commission has made its initial determination."

The parties have not completed discovery concerning the Utility Service Agreement and have not briefed their interpretations of the Agreement. Nevertheless, Utility's Motion briefly sets forth Utility's interpretation of the Utility Services Agreement. In response, Swing First first points out that Utility's interpretation would render the Utility Services Agreement a nullity. Utility maintains that the Agreement provides it the right to deliver water from any source to Swing First and that Swing First would have to pay the applicable tariffed rate for that water. This is nonsense. Utility's interpretation would put Swing First in a worse position than if it had simply signed up to be an effluent customer. No party would voluntarily sign such a contract.

Second, Utility ignores that the other parties to the Agreement besides Utility include: Johnson Ranch Holdings, L.L.C., George H. Johnson, and the George H. Johnson Revocable Trust (George H. Johnson and Jana S. Johnson, co-trustees). These related Johnson parties also benefited from the Agreement. Mr. Johnson's use of Utility in the Agreement to further his personal financial is consistent with how he has used Utility to support in his business dealings with Swing First. Here are just a few examples Swing First is aware of so far:

1. In April of 2006 Swing First agreed to manage the Golf Club at Oasis ("Oasis Golf Club"), for George Johnson, Utility's owner, in exchange for a water credit of 150 million gallons per year to be provided by Utility. Swing First's Counterstatement of Facts ("CSF") at ¶ 21.

2. During most of the six-month term of service, Utility effectuated the water credit by not billing Swing First for water. Swing First received no other compensation for its management services. CSF ¶ 24

3. In late 2006, Utility's employees changed Swing First's CAP water rate to $3.75 per thousand gallons at the direction of Mr. Johnson. Billing at this rate continued for nearly one year. CSF ¶ 25.

4. In 2007, Johnson Utilities decided at the direction of Mr. Johnson to reverse the 2006 credits and now is improperly asking Swing First to pay for the water not billed in 2006. CSF ¶ 26.

5. Utility provided free irrigation water to the Oasis Golf Club. CSF ¶ 28.

6. Brian Tompsett, Utility's Executive Vice President, paid for Oasis Golf Club expenses by providing checks drawn on Utility. CSF ¶ 29.

7. Mr. Tompsett paid Swing First for the Oasis Golf Club liquor license by a check drawn on Utility. CSF ¶ 30.

Mr. Johnson's business practices shed further light on the Agreement. In contrast to Utility's strained interpretation of the Agreement, it is really quite clear that under the Agreement:

1. Swing First has the first right to all effluent generated in Utility's service territory.
2. Utility may satisfy this obligation by either delivering effluent, or at its option, delivering water from another source.
3. Regardless of the source of the water, Swing First is obligated to pay for the water at Utility's rate for effluent water as set by the Arizona Corporation Commission.
4. To the extent that Utility's payment is less than the tariffed rate for the water delivered, one of the other Johnson Parties, who are benefitting from the Agreement, is obligated to make Utility whole.

Further discovery is necessary to determine whether Mr. Johnson in fact made the Utility whole for Swing First's effluent payments made and for the water credits he instructed Utility to provide to Swing First.

Although Swing First's interpretation of the Agreement seems obvious, additional discovery, hearings, and legal argument are needed to finally resolve the correct interpretation of the Utility Services Agreement.[14]

B Utility Has Not Corrected Billing Errors

Utility alleges that it has corrected billing errors. Swing First strongly disagrees.[15] This is a genuine issue of material fact, for which summary judgment would be inappropriate. Additional discovery, hearings, and briefs will be needed to resolve this issue.[16]

C Utility Has Overcharged Swing First for Monthly Minimums

Utility alleges that it has properly charged Swing First for Monthly Minimums. Swing First disagrees.[17] This is a genuine issue of material fact, for which summary judgment would be inappropriate.

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[14] Marks Rule 56(f) Affidavit.
[15] CSF ¶¶ 17-27, 35-37.
[16] Marks Rule 56(f) Affidavit.
[17] CSF ¶¶ 15-18.

Swing First's understanding, based on both the Utility Service Agreement and Utility's representations, is that Swing First is entitled, at a minimum, to receive all the effluent that Utility can generate and deliver.[18] Utility generates sufficient treated effluent from its San Tan Water Reclamation Plan to satisfy all of Swing First's irrigation needs.[19] Swing First does not need a CAP-water connection, provided that Utility delivers the treated effluent to which Swing First is entitled.[20] The CAP-water meter is strictly for Utility's convenience and it is inappropriate to charge Swing First for this meter and connection.

Additional discovery, hearings, and briefs will be needed to resolve this issue.[21]

D Johnson and Tompsett Make No Distinctions Between Utility and the Other Johnson Entities

Utility alleges that the Commission has no jurisdiction over Johnson International. However, the actions of Utility and Johnson International belie that argument. Messrs. Johnson and Tompsett do not distinguish between the two companies. Therefore, the Commission may also disregard any paper distinctions.

Although much more discovery is still needed, it seems clear that Utility, Johnson International, and the Oasis Golf Resort & Community, LLC ("Oasis Golf"), are essentially the same entity. Utility does not deny that they are affiliates. According to Commission records, Mr. Johnson controls all the companies. Mr. Tompsett both manages Utility and provides services and funds for the other entities. Utility does not deny that Swing First managed the Oasis Golf Course for Mr. Johnson, who also controls Utility. In compensation for its management services, Mr. Johnson promised Swing First free irrigation water for its Johnson Ranch Golf course.[22] Utility then provided "free" water to Swing First for most of the time that Swing First managed the Oasis Golf Course.[23] At Mr. Johnson's direction, Utility then reversed

[18] CSF ¶ 9.
[19] CSF ¶ 16.
[20] CSF ¶ 15.
[21] Marks Rule 56(f) Affidavit.
[22] CSF ¶ 21.
[23] CSF ¶ 24.

the credit.[24] Utility paid for Oasis Golf expenses.[25] Utility paid for Oasis Golf's liquor license.[26] Perhaps most damning, Utility has been providing free water for Oasis Golf.[27]

The most reasonable interpretation of these facts is that there was a three-way management agreement between Swing First, and the two Johnson controlled entities: Utility, and Oasis Golf. Swing First would, and did, provide management services for Oasis Golf. To compensate Swing First, Utility would, and did, provide free water for Swing First's Johnson Ranch golf course. To complete the triangle, Oasis Golf would pay Utility the tariffed rate for the water delivered to Swing First. Additional discovery is needed to ascertain whether Johnson International made the required payments, but clearly Utility was the Johnson entity that was directed to pay Swing First for its management services.

Utility argues that it could not discriminate in favor of Swing First by providing irrigation water at anything less than tariff rates. Swing First does not dispute that Utility is obligated to charge its tariffed rates for tariffed services. However, the tariffs do not prevent a third party, such as Oasis Golf or Johnson International, from agreeing to pay Utility for Swing First's water usage in return for Swing First's management services. This is particularly the case when all three entities are controlled by one person, George Johnson.

If Oasis Golf did not make the required payments to Utility, then Mr. Johnson appears to have effectively transferred funds from Utility to Oasis Golf, without compensation, in direct violation of A.R.S. 40-334(A) and the Commission's affiliate-interest rules. This would be consistent with Utility's provision of free irrigation water to Oasis Golf and its payment of other Oasis Golf expenses.

Summary judgment is clearly not appropriate at this time because additional discovery, hearings, and briefs will be needed to resolve this issue.[28]

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[24] CSF ¶ 26.
[25] CSF ¶ 29.
[26] CSF ¶ 30.
[27] CSF ¶ 28.
[28] Marks Rule 56(f) Affidavit.

These illegal transactions between the Johnson companies appear to have occurred on a scale never before seen by the Commission. Mr. Johnson appears to be using Utility as his personal piggy bank. In the rate-case docket, Swing First has begun discovery and anticipates that the Commission will thoroughly investigate these illegal affiliate transactions, it is hoped through an independent audit at Utility's expense. Certainly, this complaint case is not the best forum for this investigation. Until the Commission resolves these issues in the rate-case docket, hearings in this complaint docket should be continued.

E Utility Has Illegally Charged All Its Customers for The Superfund Tax

Utility bills all its water and effluent customer, including Swing First, each month for a Superfund "Tax" at the rate of $0.0065/1000 gallons.[29] Swing First alleges, both in this docket and in the rate case docket, that Utility is knowingly and illegally passing through a usage-based tax, as expressly prohibited in Decision No. 64598, dated March 4, 2002.

Utility tries its best to tap-dance around the facts, but Utility is clearly passing through a tax based on the customer's usage, at the rate of $0.0065/1000 gallons. Utility states that the tax is based on the "customer's monthly water deliveries." This is a distinction without a difference. In fact, a customer's usage is measured by its metered monthly water deliveries.

In any event, now that the Commission will be taking up this issue in Utility's rate case, it would be inappropriate at this time to consider this issue in Swing First's complaint case. The Commission's determination in the rate case will bind both Utility and Swing First in this docket. Until the Commission resolves this issue in the rate-case docket, hearings in this complaint docket should be continued.

F The Commission Does Have Jurisdiction Over Mr. Johnson

Mr. Johnson controls Utility and his actions as Utility's representative made Swing First's Complaint necessary. Many of his statements and activities were outrageous. The Commission has jurisdiction over Utility. The Commission also jurisdiction to order Utility's

[29] Utility Statement of Facts at ¶ 13. Utility characterizes this tax as the Water Quality Assurance Revolving Fund tax."

owner and manager to correct his outrageous statements and activities – including making a public apology. Although the Commission has no personal jurisdiction over Mr. Johnson, it could enforce its order with a fine, payable if Mr. Johnson does not satisfactorily apologize.

G Utility is Not Entitled to Summary Judgment on Its Counterclaim

For all the reasons stated above, Summary Judgment is not appropriate for Utility on its counterclaim. This is a genuine issue of material fact. In fact, Utility has over-billed Swing First Golf by more than $70,000.[30]

V CONCLUSION

Utility's Motion is premature because discovery has not been completed. Utility's Motion also involves issues that will be addressed and resolved in Utility's rate case. Utility's Motion also incorrectly states the law and facts. Utility's Motion has been met with the required counterstatement of facts and an affidavit, which demonstrate that there are genuine issues of material fact between the parties. Finally, Utility's Motion has been met with a Rule 56(f) Affidavit, demonstrating that ruling on the Motion is inappropriate until discovery is completed in this case and the rate-case docket.

VI REQUESTED RELIEF

Swing First asks that the Administrative Law Judge:

1. Continue ruling on Utility's Motion for Summary Judgment until discovery has been completed and the Commission has ruled on Utility's rate application in Docket No. WS-02987A-08-0180; and
2. Continue hearings in this docket until discovery has been completed and the Commission has ruled on Utility's rate application in Docket No. WS-02987A-08-0180.

In the alternative, should the Administrative Law Judge determine to address the Motion for Summary Judgment, Swing First asks the Judge to issue a Recommended Opinion and Order denying the Motion.

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[30] CSF ¶ 37.

RESPECTFULLY SUBMITTED on December 15, 2008.

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COUNTERSTATEMENT OF FACTS

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON, Chairman
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JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE FORMAL COMPLAINT OF SWING FIRST GOLF LLC AGAINST JOHNSON UTILITIES LLC	DOCKET NO. WS-02987A-08-0049 **COUNTERSTATEMENT OF FACTS IN SUPPORT OF RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

Swing First Golf LLC ("Swing First") hereby submits this Counterstatement of Facts in Support of its Response to the Motion for Summary Judgment filed by Johnson Utilities Company ("Utility").

Responses to Utility's Statement of Facts

1. Swing First does not dispute Utility's Statement of Fact No. 1.

2. Swing First does not dispute Utility's Statement of Fact No. 2.

3. Swing First does not dispute Utility's Statement of Fact No. 3.

4. Swing First does not dispute Utility's Statement of Fact No. 4.

5. Swing First does not dispute Utility's Statement of Fact No. 5.

6. Swing First does not dispute Utility's Statement of Fact No. 6, except to state that Mr. Ashton is a managing member of Swing First. See the Attached Affidavit of David Ashton ("Ashton Affidavit") at ¶ 2.

7. Swing First does not dispute the first sentence of Utility's Statement of Fact No. 7. Concerning the second sentence, Swing First denies that Utility has provided service to Utility consistent with the Utility Services Agreement or the Commission's approved tariffs Ashton Affidavit ¶¶ 7-14, 19-21, 27-31.

8. Concerning the first sentence of Utility's Statement of Fact No. 8, Swing First denies that Utility supplies Non-Potable Central Arizona Project ("CAP") water and effluent to Swing First Golf to water the golf course pursuant to tariffs filed with and approved by the Commission in accordance with Paragraph 9(c) of the Agreement. Ashton Affidavit ¶¶ 7-14, 19-21, 27-31. Swing First does not dispute the second and third sentences of Utility's Statement of Fact No. 8, except to deny any implication that Swing First has any need for CAP Water.

9. Swing First disputes Utility's Statement of Fact No. 9. Ashton Affidavit ¶¶ 7-14, 19-21, 27-31. Paragraph 9 of the Agreement concerns sales of effluent generated and treated by Utility for the benefit of the Johnson Ranch Golf Course. Ashton Affidavit ¶ 8. The Agreement granted the purchaser first right to all effluent generated in Utility's service territory. Ashton Affidavit ¶ 8. If operationally convenient, Utility could substitute water from other sources, but that water ("exchange water") would still be priced at the effluent rate. Ashton Affidavit ¶ 8.

10. Swing First does not dispute the first sentence of Utility's Statement of Fact No. 10, except to add that Swing First does not require Utility's CAP-water service. Ashton Affidavit ¶ 9. Swing First does not dispute the second and third sentences of Utility's Statement of Fact No. 10, except to deny any implication that Swing First requires CAP-water service or should pay the associated monthly minimum charge.

11. Swing First does not dispute the first sentence of Utility's Statement of Fact No. 11. Swing First denies the second sentence and states affirmatively that billing errors have not been corrected. Ashton Affidavit ¶¶ 7-14, 19-21, 27-31. Swing First does not dispute the third sentence, except to deny any implication that billing errors have been corrected.

12. Swing First does not dispute the first and second sentences of Utility's Statement of Fact No. 12. Swing First denies the third sentence and states affirmatively that Utility has not corrected its billing errors. Ashton Affidavit ¶¶ 7-14, 19-21, 27-31.

13. Swing First does not dispute the first sentence of Utility's Statement of Fact No. 12. Swing First denies the second sentence and states affirmatively that Utility's pass-through of the WQARF tax is contrary to Utility's tariffs and Decision No. 64598, dated March 4, 2002.

14. Swing First denies Utility's Statement of Fact No. 14 and states affirmatively that Utility continues to overcharge Swing First and owes Swing First an amount in excess of $70,000. Ashton Affidavit ¶ 31.

Additional Statements of Fact

15. Swing First has no need for CAP water or a meter. Ashton Affidavit ¶ 9.

16. Utility's San Tan Water Reclamation Plant ("San Tan WRP") produces sufficient treated effluent to satisfy Swing First's irrigation needs for the Johnson Ranch Golf Course. Ashton Affidavit ¶ 10.

17. Instead of water from the San Tan WRP, Utility has supplied the majority of Swing First's irrigation needs by water delivered through a CAP-water meter and billed to Swing First at Utility's CAP rate. Ashton Affidavit ¶ 11.

18. Utility charges Swing First each month for two minimum bills, one for effluent and the other for CAP water, regardless of whether or not water is received. All water received is charged over and above the monthly minimums. Ashton Affidavit ¶ 12.

19. In January 2008, Utility replaced Swing First's three-inch effluent meter with an eight-inch meter. At that time Utility acknowledged that it had been, for more than two years, charging Swing First for a six-inch meter when in fact Swing First had only a three-inch meter. Ashton Affidavit ¶ 13.

20. Until the filing of the complaint in this case, Utility had always billed Swing First at a rate of $0.83 or higher per thousand gallons for effluent. The Commission's rate for effluent is $0.62 per thousand gallons. Ashton Affidavit ¶ 14.

21. In April of 2006 Swing First agreed to manage the Golf Club at Oasis ("Oasis Golf Club"), for George Johnson, Utility's owner, in exchange for a water credit of 150 million gallons per year to be provided by Utility. Ashton Affidavit ¶ 15.

22. Swing First began managing the Oasis on May 1, 2006. Ashton Affidavit ¶ 16.

23. Swing First discontinued the Oasis management relationship on Nov 16, 2006, retroactive to October 31, 2006. Ashton Affidavit ¶ 17.

24. During most of the six-month term of service, Utility effectuated the water credit by not billing Swing First for water. Swing First received no other compensation for its management services. Ashton Affidavit ¶ 18.

25. In late 2006, Utility's employees changed Swing First's CAP water rate to $3.75 per thousand gallons at the direction of Mr. Johnson. Billing at this rate continued for nearly one year. Ashton Affidavit ¶ 19.

26. In 2007, Johnson Utilities decided at the direction of Mr. Johnson to reverse the 2006 credits and now is improperly asking Swing First to pay for the water not billed in 2006. Ashton Affidavit ¶ 20.

27. The water credit for six months is 75 million gallons. At the effluent rate of $0.62 per thousand gallons, the value of the credit earned by Swing First is $50,056.50. Ashton Affidavit ¶ 21.

28. Utility provided free irrigation water to the Oasis Golf Club. Ashton Affidavit ¶ 22.

29. Brian Tompsett, Utility's Executive Vice President, paid for Oasis Golf Club expenses by providing checks drawn on Utility. Ashton Affidavit ¶ 23.

30. Mr. Tompsett paid Swing First for the Oasis Golf Club liquor license by a check drawn on Utility. Ashton Affidavit ¶ 24.

31. In violation of Commission regulations, Utility has regularly failed to read Swing First's meters, in one instance for the seven months dated April through November 2007. Ashton Affidavit ¶ 25.

32. Over the weekend of February 1, 2008, Johnson Utilities over-delivered effluent to Swing First, which caused the lake bordering the 18th hole to overflow. Ashton Affidavit ¶ 26.

33. Utility twice cut off service to Swing First without notice in November 2007. Ashton Affidavit ¶ 27.

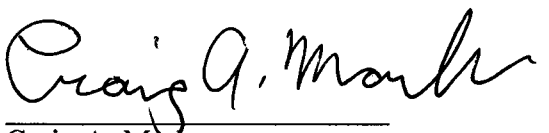
34. Swing First's attempts to resolve its billing issues with Utility have been met with incompetence, broken promises, rudeness, and outright obscenities. Ashton Affidavit ¶ 28.

35. Utility bills Utility each month for a "Superfund" tax at the rate of $0.0065/1000 gallons. Ashton Affidavit ¶ 29.

36. Since Swing First continues each month to pay for all water it receives at Utility's effluent rate and its monthly minimum charge for a three-inch effluent meter. Ashton Affidavit ¶ 30.

37. Utility continues to overcharge Swing First and owes Swing First an amount in excess of $70,000. Ashton Affidavit ¶ 31.

RESPECTFULLY SUBMITTED on December 15, 2008.



Craig A. Marks
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10645 N. Tatum Blvd.
Suite 200-676
Phoenix, AZ 85028
Craig.Marks@azbar.org
Attorney for Swing First Golf LLC

AFFIDAVIT OF DAVID ASHTON

Unexecuted
Mr. Ashton will sign this before a notary at a U.S. Consulate
The original notarized document will then be filed

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE FORMAL COMPLAINT OF SWING FIRST GOLF LLC AGAINST JOHNSON UTILITIES LLC	DOCKET NO. WS-02987A-08-0049 **AFFIDAVIT OF DAVID ASHTON IN SUPPORT OF RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT**

)
)
)

1. I am a citizen of the United States of America.

2. I am a managing member of Swing First Golf, LLC, ("Swing First") an Arizona limited liability company.

3. Swing First is the Complainant in the above captioned proceeding.

4. Swing First owns and operates the Johnson Ranch Golf Club.

5. The Johnson Ranch Golf Club is a customer of Respondent Johnson Utilities LLC ("Utility")

6. I have received and reviewed copies of a Motion for Summary Judgment and a Statement of Facts filed by Utility.

7. Swing First is a successor in interest to the September 17, 1999, Agreement Regarding Utility Service ("Agreement"), attached to Utility's Statement of Facts.

8. As I understand the Agreement:

a. Swing First has the first right to all effluent generated in Utility's service territory.

Unexecuted
Mr. Ashton will sign this before a notary at a U.S. Consulate
The original notarized document will then be filed

b. Utility may satisfy this obligation by either delivering effluent, or at its option, delivering water from another source.

c. Regardless of the source of the water, Swing First is obligated to pay for the water at Utility's rate for effluent water as set by the Arizona Corporation Commission.

9. Swing First has no need for CAP water or a CAP-water meter.

10. I am informed and believe that Utility's San Tan Water Reclamation Plant ("San Tan WRP") produces sufficient treated effluent to satisfy Swing First's irrigation needs for the Johnson Ranch Golf Club.

11. Instead of water from the San Tan WRP, Utility has supplied the majority of Swing First's irrigation needs by water delivered through a CAP-water meter and billed to Swing First at Utility's CAP rate.

12. Utility charges Swing First each month for two minimum bills, one for effluent and the other for CAP water, regardless of whether or not water is received. All water received is charged over and above the monthly minimums.

13. In January 2008, Utility replaced Swing First's three-inch effluent meter with an eight-inch meter. At that time Utility acknowledged that it had been, for more than two years, charging Swing First for a six-inch meter when in fact Swing First had only a three-inch meter.

14. Until the filing of the complaint in this case, Utility had always billed Swing First at a rate of $0.83 or higher per thousand gallons for effluent. The Commission's rate for effluent is $0.62 per thousand gallons.

15. In April of 2006 Swing First agreed to manage the Golf Club at Oasis ("the Oasis"), for George Johnson, Utility's owner, in exchange for a water credit of 150 million gallons per year to be provided by Utility.

16. Swing First began managing the Oasis on May 1, 2006.

Unexecuted
Mr. Ashton will sign this before a notary at a U.S. Consulate
The original notarized document will then be filed

17. Swing First discontinued the Oasis management relationship on Nov 16, 2006, retroactive to October 31, 2006.

18. During most of the six-month term of service, Utility effectuated the water credit by not billing Swing First for water. Swing First received no other compensation for its management services.

19. In late 2006, Utility's employees changed Swing First's CAP water rate to $3.75 per thousand gallons at the direction of Mr. Johnson. Billing at this rate continued for nearly one year.

20. In 2007, Johnson Utilities decided at the direction of Mr. Johnson to reverse the 2006 credits and now is improperly asking Swing First to pay for the water not billed in 2006.

21. The water credit for six months is 75 million gallons. At the effluent rate of $0.62 per thousand gallons, the value of the credit earned by Swing First is $50,056.50.

22. Utility provided free irrigation water to the Oasis Golf Course, and did not bill its employees for water service at their homes.

23. Brian Tompsett, Utility's Executive Vice President, paid for Oasis Golf Course expenses by providing checks drawn on Utility.

24. Mr. Tompsett paid Swing First for the Oasis Golf Course liquor license by a check drawn on Utility.

25. In violation of Commission regulations, Utility has regularly failed to read Swing First's meters, in one instance for the seven months dated April through November 2007.

26. Over the weekend of February 1, 2008, Johnson Utilities over-delivered effluent to Swing First, which caused the lake bordering the 18th hole to overflow.

27. Utility twice cut off service to Swing First without notice in November 2007.

28. Swing First's attempts to resolve its billing issues with Utility have been met with incompetence, broken promises, rudeness, and outright obscenities.

Unexecuted
Mr. Ashton will sign this before a notary at a U.S. Consulate
The original notarized document will then be filed

29. Utility bills Swing First each month for a "Superfund" tax at the rate of $0.0065/1000 gallons.

30. Since Swing First continues each month to pay for all water it receives at Utility's effluent rate and its monthly minimum charge for a three-inch effluent meter.

31. Utility continues to overcharge Swing First and owes Swing First an amount in excess of $70,000.

Signed:_____
David Ashton

Subscribed and sworn before me this __ day of December, 2008, by David Ashton.

Notary: _____

Seal

RULE 56(F) AFFIDAVIT OF CRAIG MARKS

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE FORMAL COMPLAINT OF SWING FIRST GOLF LLC AGAINST JOHNSON UTILITIES LLC	DOCKET NO. WS-02987A-08-0049 **AFFIDAVIT OF CRAIG MARKS IN SUPPORT OF RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT**

STATE OF ARIZONA)
) ss.
County of Maricopa)

Craig Marks hereby states:

1. I am an attorney in good standing in the State of Arizona, Bar Number 018077.

2. I represent Swing First Golf, LLC ("Swing First"), the Complainant in the above-captioned case.

3. Respondent is Johnson Utilities LLC ("Utility").

4. I am submitting this affidavit in accordance with Rule 56(f) of the Arizona Rules of Civil Procedure.

5. Swing First requires additional discovery to fully present by affidavit facts essential to justify its opposition to Utility's Motion for Summary Judgment.

6. This additional discovery is expected to include at least,

   a. Utility's additional responses to data requests in Utility's rate case, Docket No. WS-02987A-08-0180.

   b. Utility's responses to several more rounds of discovery in both this docket and the rate case docket.

c. Depositions of George Johnson, Utility's owner, Brian Tompsett, Utility's Executive Vice President, and December Davis, believed to be the Chief Financial Officer of the Johnson Companies.

7. Because of Utility's abuse of discovery deadlines, refusal to fully answer questions, and general bad faith, I cannot predict how long this additional discovery will take.

Signed: _____
Craig Marks

Subscribed and sworn before me this 15 day of December, 2008, by Craig Marks.

Notary: _____

Seal:

LEIGHANNE SUDEITH
NOTARY PUBLIC - ARIZONA
MARICOPA COUNTY
My Commission Expires
April 30, 2010

MOTION TO COMPEL - DOCKET NO. WS-02987A-08-0180

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF THE APPLICATION OF JOHNSON UTILITIES, L.L.C., DBA JOHNSON UTILITIES COMPANY FOR AN INCREASE IN ITS WATER AND WASTEWATER RATES FOR CUSTOMERS WITHIN PINAL COUNTY, ARIZONA.	DOCKET NO. WS-02987A-08-0180 **SWING FIRST GOLF LLC'S MOTION TO COMPEL**

Pursuant to Commission Rule R14-3-106-K and Rule 37(a)(2) of the Arizona Rules of Civil Procedure, Swing First Golf LLC ("Swing First") hereby moves for an order compelling discovery responses from Johnson Utilities LLC ("Utility") , the applicant in this case.

In support of its motion, Swing First states as follows:

I BACKGROUND

A Utility's Conduct Has Been Outrageous

Utility is controlled by the notorious George Johnson. Mr. Johnson and his companies believe they are above the law, regularly flouting federal and state law. They have polluted and filled our precious desert rivers, bulldozed historical sites, and moonscaped desert vegetation. They waged germ warfare against rare bighorn sheep, causing widespread death and blindness. As a result of these actions, they have paid some of the largest fines in state and federal history.

Utility's conduct has been consistent with the outrageous behavior of Mr. Johnson and his companies. Just within the last year, Utility regularly discharged raw sewage into a pristine desert wash, endangering nearby customers and their families. Utility then sought to silence outraged customers by suing them for defamation for having the temerity to protest Utility's

negligence and foot dragging. Very recently, Utility was caught burying dangerous sewage sludge on its property, rather than properly disposing of it.

Utility continuously thumbs its nose at the Commission. Despite being explicitly told that it cannot pass-through usage taxes to its customers, Utility has ignored the Commission's Order and passed through a usage tax to all its water and effluent customers. Utility also appears to have deliberately delayed filing this rate case because it knew it was overcharging its water customers by several million dollars per year. Finally, Utility has been engaging in illegal transactions with its affiliated company to the detriment of its customers.

1 Utility and Its Affiliates Are under the Common Control of George H. Johnson

George H. Johnson is Utility's majority owner and is Utility's ultimate decision maker. George Johnson also controls several other companies that have been in the headlines in recent years, including Johnson International, Inc. ("Johnson International"); and General Hunt Properties, Inc. ("General Hunt"). (Mr. Johnson, Utility, and the other Johnson companies may be referred to for convenience as the "Johnson Group.")

2 George Johnson and His Companies Paid the Largest Civil Environmental Settlement in Arizona History for Bulldozing Archeological Sites, Razing Protected Vegetation, Discharging Pollutants into Arizona Rivers, and Conducting Germ Warfare Against Protected Bighorn Sheep.

In 2005 the Arizona Attorney General brought a lawsuit on behalf of the Arizona Department of Environmental Quality ("ADEQ"), the Arizona State Land Department, the Department of Agriculture, the Arizona State Museum and the Arizona Game and Fish Commission. The suit charged George Johnson, Johnson International, General Hunt, and several Johnson contractors with numerous violations of state law and destruction of natural and archeological resources, including:

- Bulldozing and clearing nearly 270 acres of State Trust Lands located in and near the Ironwood National Monument and the Los Robles Archeological District.

- Bulldozing and clearing an estimated 2,000 acres of private lands in the Santa Cruz River Valley without obtaining permits required by state law.
- Destroying portions of seven major Hohokam archeological sites, circa A.D. 750-1250.
- Destroying more than 40,000 protected native plants on State Trust Lands, including Saguaro, Ironwood, Mesquite, Palo Verde and other protected species.
- Violating the state's clean water laws by failing to secure required permits and discharging pollutants into the Little Colorado River, the South Fork of the Little Colorado River and tributaries of the Santa Cruz River.
- Negligently causing a disease epidemic that resulted in the death of at least 21 rare Arizona desert bighorn sheep and serious injury to numerous others.

Ultimately, George Johnson and the other defendants agreed to pay a fine of 12.1 million dollars— the largest civil environmental settlement in Arizona history—to settle these charges.[1]

Attachment B to this Motion is a copy of a February 2008 article from Phoenix Magazine. The article provides more detail about George Johnson's activities, including moonscaping pristine desert land, destroying archaeological sites, clearing and filling desert rivers, and conducting germ warfare against endangered bighorn sheep.

3 George Johnson and His Companies Paid One of the Largest Settlements in Federal History for Bulldozing the San Juan River

In a related case, the United States Environmental Protection Agency ("EPA") sued George Johnson, his companies, and his contractor for bulldozing, filling, and diverting approximately five miles of the Santa Cruz River. In October 2008, George Johnson and the other defendants agreed to pay a fine of $1.25 million, the largest penalty in the history of EPA's Pacific Southwest Region, and one of the largest in EPA's history under Section 404 of the Clean Water Act.[2]

[1] See Attachment A, a copy of the ADEQ press release.
[2] See Attachment C, a copy of the Department of Justice press release.

4 Utility Dumped Raw Sewage into a Neighborhood Wash

Over several months in the spring of 2008, Utility dumped over 10,000 gallons of raw sewage into the Queen Creek Wash and an adjoining neighborhood, allegedly as a result of a pump failure at its neighboring sewage-treatment plant.[3] The 2008 discharges were only months after a December 2007 discharge from the same plant and were the latest in a long series of environmental violations and sewage spills.

5 Utility Harasses Customers with Frivolous Lawsuits

Neighbors were justifiably concerned with their health and safety as a result of Utility dumping raw sewage into their neighborhood.[4] Two residents organized a protest against Utility and posted pointed comments on a community web page.[5] In retaliation, Utility sued the two residents for defamation.[6]

This was not an isolated incident. Swing First filed a complaint at the Commission against Utility concerning utility's rates and charges.[7] Utility retaliated against Swing First's manager, David Ashton, by suing him and his wife for defamation.[8]

Utility's abusive lawsuits are obviously intended to chill protests by forcing defendants to endure the emotional burden of defending a lawsuit and incur the expense of hiring attorneys to defend the lawsuits. This is not a new tactic from the Johnson Group. They also sued Attorney General Terry Goddard and his wife Monica for defamation, because Mr. Goddard had the temerity to try to bring the Johnson Group to justice for its outrageous environmental pillaging.[9]

6 Utility Illegally Stored Dangerous Sewage Sludge

Utility had barely finished contaminating the Queen Creek Wash, when a surprise inspection by ADEQ caught Utility storing dangerous sewage sludge in uncovered trenches.[10]

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[3] See Attachment D, a copy of a June 11, 2008, Article from the East Valley Tribune.
[4] See Attachment E, a copy of a June 17, 2008, Article from the East Valley Tribune.
[5] See Attachment F, a copy of a June 27, 2008, Article from the East Valley Tribune.
[6] *Id.*
[7] Docket No. WS-02987A-08-0049.
[8] Maricopa County Superior Court Docket No. CV2008-000141.
[9] Attachment B at 2.
[10] See Attachment G, a copy of an October 28, 2008, Article from the East Valley Tribune.

ADEQ issued even more notices of violations to Utility, which Utility should now have enough of to paper a large wall.

7 Utility Knowingly and Illegally Charges Its Customers For Taxes

Utility bills its water and effluent customer each month for a Superfund "Tax" at the rate of $0.0065/1000 gallons.[11] Utility's water tariff does not authorize this charge.

Utility's water tariff does state the following:

> In addition to all other rates and charges authorized herein, the Company shall collect from its customers all applicable sales, transaction, privilege, regulatory or other taxes and assessments as may apply now or in the future, per Rule R14-2- -409(D)(5).[12]

Rule R14-2-409(D)(5) states: In addition to the collection of regular rates, each utility may collect from its customers a proportionate share of any privilege, sales or use tax." However, Rule R14-2-409(D)(5) only allows Utility to recover taxes based on revenue, not usage.

In 2002, the Commission explicitly told Utility that it could not pass through to its customers another tax, also based on usage like the Superfund tax. In Docket No. SW-02987A-01-0795, Utility asked the Commission to clarify that Rule R14-2-608(D)(5) provided tariff authority to pass through to its water customers its Central Arizona Groundwater Replenishment District ("GRD") Taxes. Like the Superfund tax, the GRD Tax was not based on sales revenue. The Commission denied Utility's request:

> Staff determined that the GRD tax cannot be treated as a pass-through tax within the Arizona Administrative Code R14-2-409.D.5 because it is not a "privilege, sales or use tax" since GRD taxes are not based on sales revenue. Therefore, GRD taxes do not fall within the scope of the Company's current tariff.
>
> ...
>
> The Commission having reviewed the application and Staff's Memorandum dated January 31, 2002, concludes that the GRD tax is not the type of tax that can be passed

[11] Utility may characterize this tax as "the Water Quality Assurance Revolving Fund tax."
[12] Water Tariff at Sheet 6.

through within Arizona Administrative Code, R14-2-409.D.5 and is, therefore, not included in the Company's current tariff.[13]

Despite being explicitly told that it could not pass through usage-based taxes, Utility has knowingly passed through another usage-based tax to its customers: the Superfund tax. Apparently Utility does not believe that this Commission's decisions mean anything. It has deliberately ignored the Commission's order and for seven years has passed through a usage-based tax to its customers. Deliberate, illegal acts like this must be punished.

8 Utility Ignored a Commission Deadline and Delayed this Rate Filing So It Could Continue Overcharging Its Customers Millions of Dollars per Year.

In Decision No. 68235, dated October 25, 2005, the Commission ordered Utility to file a rate case for its water and wastewater divisions by May 1, 2007, using a 2006 test-year. Although it has made a series of dilatory filings requesting relief from that requirement, the Commission never granted Utility's request.

Acting like any other member of the Johnson Group, Utility decided to just ignore the Commission's Order. Despite never having obtained Commission relief from the filing deadline, Utility delayed its rate filing until March 31, 2008, and it is now based on a 2007 test year. The reason for the one-year delay then became apparent – Utility was substantially overcharging its water customers. Even based on Utility's calculations, Utility over-collected over $2,000,000 from its water customers in 2007.[14]

This could not have been a surprise to Utility. Most likely, it also substantially overcharged its water customers in 2006. If it had filed when it was ordered to, it would likely have had to reduce rates a year earlier. Utility simply wanted to keep its illegal gains and hoped no one would notice.

9 Utility Has Illegally Provided Free Water to its Affiliate

A.R.S. 40-334(A) provides that:

[13] Decision No. 64598, dated March 4, 2002, at 2.
[14] See Schedule A-1.

> A public service corporation shall not, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any person or subject any person to any prejudice or disadvantage.

Despite this clear prohibition, Utility has at least twice provided free water for the benefit of another member of the Johnson Group, Johnson International. First, for years Utility has been providing free irrigation water for the Oasis Golf Course, owned by Johnson International.[15] Second, George Johnson and Johnson International contracted in 2006 with Swing First to manage the Oasis Golf Course. Swing First's compensation was to be free irrigation water from the Utility for Swing First's golf course.[16] Johnson International never reimbursed Utility for the irrigation water delivered to Swing First.

B Utility Is Also Flouting the Commission's Procedural Order

On August 15, 2008, the Commission issued a Procedural Order in this docket ("Procedural Order"). It provided (in part) that: discovery shall be as permitted by law and the rules and regulations of the Commission, except that until March 6, 2009, any objection to discovery requests shall be made within 7 calendar days of receipt and responses to discovery requests shall be made within 10 calendar days of receipt. (Emphasis added.)

As it has done many other times, Utility decided to just ignore the Commission's Order. First, it unilaterally delayed responding to data requests until well past the 10-calendar-day deadline. Then along with its grossly overdue responses, Utility objected to answering many of the data requests.

Utility cannot claim that it is ignorant of the clear requirements of the Procedural Order or of the Commission's Rules of Practice and Procedure. George Johnson is an experienced litigant. Utility has also been a party to numerous Commission cases. Utility is represented by Jeffery Crockett, an experienced regulatory attorney and a member of Snell & Wilmer, Arizona's

[15] See Attachment H, Response to DR 1.16.
[16] See generally Docket No. WS-02987 A-08-0049. George Johnson later decided not to pay Swing First and ordered Utility to rebill Swing First for the water.

largest law firm. There is simply no excuse for Utility's blatant disregard of the Commission's Procedural Order.

C Discovery Is Necessary For Swing First to Prosecute its Case

1 Expected Testimony

Swing First expects to testify as follows:

1. Given the already discovered illegal affiliate transactions between Johnson Utilities and Johnson International, Utility should be required to fund an independent audit of both companies' books over at least the last five years to discover all such transactions and determine the impact of such transactions on customers.

2. An independent management audit should be conducted at Utility's expense to determine whether Johnson Utilities is a fit and proper entity to continue to hold its certificate of convenience and necessity. This audit should investigate at least:

a. Prior activities and fines related to George Johnson and the Johnson Group;

b. Utility's continual discharges of raw sewage into the Queen Creek Wash and other environmental violations;

c. Utility's illegal storage of sewage sludge on site;

d. Utility's harassment of customers through defamation lawsuits;

e. Other customer service issues.

f. Utility's continual disregard of Commission statutes, rules, and orders.

g. Utility's provision of free water to its affiliates.

h. Other illegal transactions, if any, between Utility and its affiliates.

3. No wastewater rate increase should be allowed until the financial and management audits have been completed, and the Commission has been able to evaluate the results of the audits.

4. Utility should be fined for its blatant disregard of its public service obligations, environmental laws, and explicit Commission statutes, rules, and orders.

5. Utility's authorized return on equity should be reduced to further penalize it for its blatant disregard of its public service obligations, environmental laws, and explicit Commission statutes, rules, and orders.

6. Because of Utility's unauthorized delays in filing its rate case, Utility should immediately reduce its water rates to the level proposed in its direct testimony, after giving effect to the return-on-equity reduction. The rate reduction should be retroactive to December 2007, and Utility should refund all amounts collected above those rates until the date of the rate reduction. After a final Decision is issued, further refunds should be made, based on the rates set in that Decision.

7. Utility should refund all Superfund ("Water Quality Assurance Revolving Fund") taxes collected from its customers since March 4, 2002, the date of Decision No. 64598.

2 Need for Discovery

Through discovery, Swing First has attempted to confirm the facts set forth in the various newspaper articles and press releases attached to this motion. These facts are necessary for Swing First to support its case. As would be expected based on its past conduct, Utility has stonewalled Swing First's legitimate inquiries.

II ARGUMENT

A Utility Waived Any Discovery Objections

As stated above, the Procedural Order provided (in part) that: discovery shall be as permitted by law and the rules and regulations of the Commission, except that until March 6, 2009, any objection to discovery requests shall be made within 7 calendar days of receipt and responses to discovery requests shall be made within 10 calendar days of receipt. (Emphasis added.) Utility disregarded this requirement of the Order.

Swing First's First Data Requests were tendered to Utility through counsel by e-mail on August 8, 2008. In accordance with the Procedural Order, objections were due on August 15, 2008. Only after being threatened with a motion to compel, did Utility finally "respond" to the First Data Requests, but not until September 18, 2008, 41 calendar days after receipt. Utility

purported to object to several of the questions at that time, but those objections were clearly not timely and have been waived for failure to comply with the deadlines in the Procedural Order. Following discussions between counsels, Utility supplemented several of its responses, but, as will be discussed in detail below, several responses are still needed.

Swing First's Second Data Requests were tendered to Utility through counsel by e-mail on September 17, 2008. Objections were due on September 24, 2008. Utility finally responded to these requests on October 17, 2008, including an untimely objection and a partial response to Question 2.6. The objection was therefore waived and the response is still needed.

Swing First's Third Data Requests were tendered to Utility through counsel by e-mail on October 3, 2008. Objections were due on October 10, 2008. Utility finally responded to these requests on October 22, 2008, including untimely objections to most of the questions. These objections were therefore waived and the responses are still needed.

B Utility's Waived Objections Are Meritless

Even if Utility had timely objected to the data requests, its objections are meritless and clearly designed to thwart the discovery process. For the convenience of the Commission, Swing First will quote each data request and Utility's response, and then discuss why Utility's objection is meritless.

1.3 For each month during the period of 2005 to the present, please provide, by customer the amount of treated effluent delivered and sold by Utility. Please also specify the rate paid by each customer. (Swing First does not require specific identifying information for any customer, such as name or address. Utility may identify the customer by letter, number, or other consistent designation.)

Objection: Swing First Golf receives effluent from Johnson Utilities' San Tan Water Reclamation Plant ("San Tan WRP"). Johnson Utilities objects to this data request to the extent that it seeks information regarding deliveries of effuent from wastewater reclamation plants other than the San Tan WRP on the grounds that: (i) the data request is overly broad; and (ii) the information requested is not relevant to this rate casc proceeding. Moreover, information regarding the amount of effluent delivered to Swing First Golf, as well as the rate paid by Swing First Golf, is in the possession of Swing First Golf. Subject to this objection, the remainder of this data request is answered below.

Response: The San Tan WRP is the only Johnson Utilities wastewater treatment plant that is physically connected via a pipeline to the facility owned and operated by Swing First Golf. The rate charged to Swing First Golf for effluent is set forth in Johnson Utilities' ACC-approved tariff, which is a matter of public record. The only other entity which receives effluent from the San Tan WRP is the San Tan Heights Homeowners Association ("Association"), and Swing First Golf is aware that Johnson Utilities supplies effluent to the Association. Johnson Utilities considers information regarding the delivery of effluent to the Association confidential customer information which may not be disclosed without the consent of the customer. Information regarding the amount of effluent delivered to Swing First Golf by Johnson Utilities is in the possession of Swing First Golf.

Discussion. Swing First is a full party to this case and effluent rates are at issue. These rates are set based on the cost to serve all effluent customers from all sources. Swing First has no reason to believe that the effluent rate is not proper, but is entitled to investigate the basis of that rate. Swing First is also entitled to information outside the test year to investigate whether the test-year is representative of Utility's production and sales. Finally, Utility just ignores the fact that Swing First is not asking for customer-identifying information.

1.5 For calendar years 2008 through 2010, please provide a monthly forecast of treated effluent sales within the CC&N.

Response: Johnson Utilities has not completed this response but will provide the response by Monday, September 22, 2008.

Discussion. Utility has still not provided the requested information.

1.6. Please provide a monthly count of effluent customers during the test year, and indicate whether the customer had the ability to take and store effluent.

Objection: Swing First Golf receives effluent from Johnson Utilities' San Tan Water Reclamation Plant ("San Tan WRP"). Johnson Utilities objects to this data request to the extent it seeks information regarding customers receiving effluent from wastewater reclamation plants other than the San Tan WRP on the grounds that: (i) the data request is overly broad; and (ii) the data request seeks information that is not relevant to this rate case proceeding. Subject to this objection, the remainder of this data request is answered below.

Response: The only customers that received effluent from the San Tan WRP during the test year were Swing First Golf and the San Tan Heights Homeowners Association. Both customers have the ability to take and store effluent. Johnson Utilities does not know the specific effluent storage capabilities for either of these customers. Johnson Utilities assumes that Swing First Golf

knows the storage capacity of its storage reservoir(s), and thus already has this information.

Discussion. Swing First is a full party to this case and effluent sales and rates are at issue. These rates are set based on the cost to serve all effluent customers from all sources. Swing First has no reason to believe that the effluent rate is not proper, but is entitled to investigate the basis of that rate.

1.7. For each customer with the ability to take and store effluent, please estimate the customer's storage capacity.

Objection: Johnson Utilities objects to this data request to the extent it seeks information regarding the storage capacity of customers receiving effluent from wastewater reclamation plants other than the San Tan water reclamation plant (the "San Tan WRIl) on the grounds that: (i) the data request is overly broad; and (ii) the data request seeks information that is not relevant to this rate case proceeding. Subject to this objection, the remainder of this data request is answered below.

Response: See response to Swing First Golf Data Request 1.6 above.

Discussion. Swing First is a full party to this case and effluent sales and rates are at issue. These rates are set based on the cost to serve all effluent customers from all sources. Swing First has no reason to believe that the effluent rate is not proper, but is entitled to investigate the basis of that rate.

2.6 For the test year, and for each of the two preceding years, how much did Utility collect by customer class, through charges for a Superfund Tax?

Objection: Johnson Utilities objects to this data request to the extent that it seeks information regarding Water Quality Assurance Revolving Fund ("WQARF") taxes collected in years prior to the test year on the grounds that the information is not relevant to this rate case proceeding. Subject to this objection, the remainder of this data request is answered below.

Response: Johnson Utilities does not track WQARF taxes collected from its customers by customer class. The total amount of WQARF taxes collected by Johnson Utilities during the test year 2007 was $14,096.68.

Discussion. Please see section I(B)(7) above. It appears that Utility has been illegally and knowingly passing this tax through to its customers since 2002. Collections in past years are clearly relevant.

3.1 Please provide a copy of Utility's complete Affiliated Interest Report, filed on or about April 15, 2008, with the Commission's Utilities Division Director. If Utility requires execution of a protection agreement, please promptly provide a draft of such agreement for Swing First's review.

Objection: The annual filing submitted by Johnson Utilities pursuant to AA.C. R14-2-805 contains confidential business information of a non-public nature. The filing is not subject to public disclosure as set forth in A.R.S. § 40-204, and the release of this information must be ordered by the Arizona Corporation Commission.

Discussion. It appears that Utility has twice illegally provided free water to its affiliate. The Affiliated Interest Report is relevant to determine if Utility has reported these transactions as required by law, and to see if it has reported any similar illegal transactions. Contrary to the allegation in the objection, Swing First is not seeking public disclosure of this document. Further it has offered to execute a protection agreement.

3.2 Please provide copies of all pleadings filed by Utility in the last five years in cases against utility customers or other entities within Utility's CC&N including, but not limited to, the Pecan Creek Community Association, Bambi Sandquist, and Kristi Fisher. Please also provide copies of all other documents in these cases. Please provide a short status report for each case. (It is not necessary to include copies of the pleadings or an update in Utility's lawsuit against Mr. Ashton in Maricopa Superior Cour Matter CV2008-000 141.)

Objection: Johnson Utilities objects to this data request on the grounds that (i) the request is overly broad and unduly burdensome; (ii) the pleadings, documents and status reports requested are not relevant to the rate case and outside the scope of discovery; (iii) the pleadings and documents requested are matters of public record that may be readily obtained from the courts; and (iv) the requested status reports do not exist.

Discussion. It appears from newspaper articles and other sources that Utility uses lawsuits to punish customers that dare challenge it. This loathsome practice of intimidation appears to also be intended to set an example, so that other customers will be afraid to pursue complaints or other exercise their free-speech rights. Customer-service issues are regularly considered in rate cases and do affect the outcome of the cases. This is a legitimate inquiry into despicable activities of which the Commission should be aware.

3.5 Please admit or deny that Utility's affiliated entity and/or George Johnson filed a defamation lawsuit or counterclaim against Arizona Attorney General Terry Goddard and/or his office.

Objection: Johnson Utilities objects to this data request on the grounds that legal actions filed by affiliates of Johnson Utilities and/or George Johnson are not relevant to the rate case and are outside the scope of discovery. Johnson Utilities further asserts that legal pleadings filed in courts of law are public documents which speak for themselves.

Discussion. As discussed above, Utility is part of the Johnson Group, all of which are controlled by George Johnson. Utility admits that Mr. Johnson is its ultimate decision maker. Therefore, Mr. Johnson's other activities—especially those consistent with Utility's use of the courts to harass and intimidate customers—are relevant to the inquiry as to whether Utility is a fit and proper entity to hold its CC&N and the amount of rate increase justified in light of Mr. Johnson's and Utility's conduct. For example, if Mr. Johnson had been convicted of a felony such as fraud, it is unlikely that the Commission would allow him to participate in Utility's management, or to allow him to continue to own Utility. Similarly, given Mr. Johnson's reckless management of his other companies, his disregard for Arizona's environment and its heritage, his shameful treatment of his own customers, and his continued flouting of Commission orders, the Commission may well conclude that it is time for Mr. Johnson to go. It is certainly not time to let Mr. Johnson profit from these actions.

Finally, Utility has not alleged that cannot answer the simple question.

3.6 Please admit or deny that Utility's affiliated entity or entities and George Johnson were defendants in a 2005 lawsuit brought by the State alleging numerous violations of state law and destruction of the State's natural and archeological resources. Please identify the lawsuit.

Objection: Johnson Utilities objects to this data request on the grounds that legal actions involving affiliates of Johnson Utilities and/or George Johnson are not relevant to the rate case and are outside the scope of discovery. Johnson Utilities further asserts that legal pleadings filed in courts of law are public documents which speak for themselves.

Discussion. As discussed above, Utility is part of the Johnson Group, all of which are controlled by George Johnson. Utility admits that Mr. Johnson is its ultimate decision maker. Therefore, Mr. Johnson's other activities—especially those consistent with Utility's use of the courts to harass and intimidate customers—are relevant to the inquiry as to whether Utility is a fit and proper entity to hold its CC&N and the amount of rate increase justified in light of Mr.

Johnson's and Utility's conduct. For example, if Mr. Johnson had been convicted of a felony such as fraud, it is unlikely that the Commission would allow him to participate in Utility's management, or to allow him to continue to own Utility. Similarly, given Mr. Johnson's reckless management of his other companies, his disregard for Arizona's environment and its heritage, his shameful treatment of his own customers, and his continued flouting of Commission orders, the Commission may well conclude that it is time for Mr. Johnson to go. It is certainly not time to let Mr. Johnson profit from these actions.

Finally, Utility has not alleged that cannot answer the simple question.

3.7 Please admit or deny that the 2005 lawsuit was settled in December 2007, with George Johnson and certain affiliated companies agreeing to pay the State $7 million.

Objection: Johnson Utilities objects to this data request on the grounds that legal actions involving affiliates of Johnson Utilities and/or George Johnson are not relevant to the rate case and are outside the scope of discovery. Johnson Utilities further asserts that legal pleadings filed in courts of law are public documents which speak for themselves.

Discussion. As discussed above, Utility is part of the Johnson Group, all of which are controlled by George Johnson. Utility admits that Mr. Johnson is its ultimate decision maker. Therefore, Mr. Johnson's other activities—especially those consistent with Utility's use of the courts to harass and intimidate customers—are relevant to the inquiry as to whether Utility is a fit and proper entity to hold its CC&N and the amount of rate increase justified in light of Mr. Johnson's and Utility's conduct. For example, if Mr. Johnson had been convicted of a felony such as fraud, it is unlikely that the Commission would allow him to participate in Utility's management, or to allow him to continue to own Utility. Similarly, given Mr. Johnson's reckless management of his other companies, his disregard for Arizona's environment and its heritage, his shameful treatment of his own customers, and his continued flouting of Commission orders, the Commission may well conclude that it is time for Mr. Johnson to go. It is certainly not time to let Mr. Johnson profit from these actions.

Finally, Utility has not alleged that cannot answer the simple question.

3.8 Please provide a copy of the settlement agreement that resolved the 2005 lawsuit by the State.

Objection: Johnson Utilities objects to this data request on the grounds that legal actions involving affiliates of Johnson Utilities and/or George Johnson are not relevant to the rate case and are outside the scope of discovery.

Discussion. As discussed above, Utility is part of the Johnson Group, all of which are controlled by George Johnson. Utility admits that Mr. Johnson is its ultimate decision maker. Therefore, Mr. Johnson's other activities—especially those consistent with Utility's use of the courts to harass and intimidate customers—are relevant to the inquiry as to whether Utility is a fit and proper entity to hold its CC&N and the amount of rate increase justified in light of Mr. Johnson's and Utility's conduct. For example, if Mr. Johnson had been convicted of a felony such as fraud, it is unlikely that the Commission would allow him to participate in Utility's management, or to allow him to continue to own Utility. Similarly, given Mr. Johnson's reckless management of his other companies, his disregard for Arizona's environment and its heritage, his shameful treatment of his own customers, and his continued flouting of Commission orders, the Commission may well conclude that it is time for Mr. Johnson to go. It is certainly not time to let Mr. Johnson profit from these actions.

Finally, Utility has not alleged that it does not have the requested material or that it would be burdensome to provide it.

3.9 For 2008, and each of the prior five years, please provide a summary, including status, of all formal and informal complaints filed against Utility at the Corporation Commission.

Objection: Johnson Utilities objects to this data request on the grounds that (i) it requests information which is not relevant to this rate case and outside the scope of discovery; (ii) it requests the disclosure of non-public customer information; and (iii) it requests information which is publicly available on the Arizona Corporation Commission's electronic docket. Subject to this objection, Johnson Utilities provides its response below.

Response: Formal complaints are matters of public record readily available via the Arizona Corporation Commission's electronic docket, and pleadings and other filings related to formal complaints speak for themselves. All formal and informal complaints at the Commission involving Johnson Utilities as of the

date of this response have been resolved and closed, with the sole exception being the formal complaint filed by Swing First Golf LLC.

Discussion. Utility's past treatment of its customers, especially those with the courage to actually file a complaint, is clearly relevant, especially given Mr. Johnson's reckless management of his other companies, his disregard for Arizona's environment and its heritage, his shameful treatment of his own customers, and his continued flouting of Commission orders. After reviewing all this evidence, the Commission may well conclude that it is time for Mr. Johnson to go. It is certainly not time to let Mr. Johnson profit from these actions.

Informal complaints are not available on the Commission's electronic docket.

Finally, Utility has not alleged that it does not have the requested material or that it would be burdensome to provide it.

3.10 For 2008, and each of the prior five years, please provide a summary, including status of all formal and informal complaints filed against Utility in any other court or other jurisdiction.

Objection: Johnson Utilities objects to this data request on the grounds that (i) the request is vague and ambiguous; and (ii) complaints filed against the company are matters of public record which are readily available to the intervenor. Johnson Utilities further asserts that legal pleadings filed in courts of law or with governmental agencies are public documents which speak for themselves.

Discussion. Utility's objection is not valid. The request is not vague or ambiguous, nor did counsel ask for clarification, which would have been the proper course of action. Second, Utility obviously understands that Swing First is seeking information about other legal proceedings against Utility in courts of law or governmental agencies. Third, Utility is clearly the one with knowledge of the proceedings it has defended in the last five years. Swing First cannot be expected to search the records of every court and governmental agency in the United States.

For a normal small utility, this answer should be short and very easy to provide, and Utility has not claimed that it would be burdensome to provide the information. If Utility does not wish to provide a summary, Swing First would not object to being provided copies of all pleadings.

Utility has also not asserted that the requested material is irrelevant or outside the scope of discovery.

Clearly, given the incredible past treatment of its customers, especially those with the courage to actually file a complaint, is clearly relevant, especially given Mr. Johnson's reckless management of his other companies, his disregard for Arizona's environment and its heritage, his shameful treatment of his own customers, and his continued flouting of Commission orders. After reviewing all this evidence, the Commission may well conclude that it is time for Mr. Johnson to go. It is certainly not time to let Mr. Johnson profit from these actions.

Finally, Utility has not alleged that it does not have the requested material or that it would be burdensome to provide it.

3.15 For the year 2006, please provide a pro-forma income statement for Utility's water and wastewater divisions, in the form of Rate Case Schedule C-1.

Objection: Johnson Utilities objects to this data request on the grounds that it requests information which is not relevant to the rate case. The rate case uses a 2007 test year. For additional information, see the response to data request 3.11 above.

Discussion. Utility's objection is not valid. Utility chose to defy a Commission imposed filing deadline and required test year. It appears that Utility was over-earning in the year the Commission ordered for Utility's test year – 2006. It is up to Utility to establish that it was not over-earning and should not be required to implement a retroactive rate decrease, with refunds.

Utility has not asserted that it would be burdensome for to prepare the requested schedules.

3.16 Please describe with particularity Utility's 2008 discharge of untreated sewage into Queen Creek Wash, including but not limited to:

- ***How the spill occurred;***
- ***What has been done to resolve the spill;***
- ***Any health consequences to residents in the area of the spill;***
- ***Any community meetings or other public outreach;***

- ***What has been done to prevent similar future occurrences;***
- ***Any state or county regulatory responses;***
- ***How Utility obtained authority, if any, to discharge effluent into the wash, including the status of that authority;***
- ***Any civil or criminal actions related to the discharge (including defamation actions) or Utility's authority to discharge effluent into the wash.***

Response: Information regarding the sewer system overflow that occurred on the weekend of May 17-18, 2008, is a matter of public record readily available from the Arizona Department of Environmental Quality.

Discussion. Utility has not raised a proper objection. Utility does not allege that the requested information is irrelevant, that it does not have the requested information, or that it would be burdensome to provide the information. It also seems unlikely that the ADEQ record would address all the subparts of DR 3.16. Nevertheless, if Utility can in good faith can provide Swing First public information that it believes address all eight subparts of DR 3.16, then Swing First will not require Utility to summarize the information as requested.

REQUESTED RELIEF

Swing First asks:

A. The Commission to order Utility to promptly provide the information requested in Swing First's Data Requests numbered 1.3, 1.5, 1.6, 1.7, 2.6, 3.1, 3.2, 3.3, 3.6, 3.7, 3.8, 3.9, 3.10, 3.15, and 3.16; and

B. For such further relief as the Commission deems appropriate.

RESPECTFULLY SUBMITTED on November 21, 2008.

/s/Craig A. Marks
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on November 21, 2008, to:

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Craig A. Marks

ADEQ Arizona Department of Environmental Quality **News Release**

1110 West Washington Street • Phoenix, Arizona 85007 • http://azdeq.gov

DATE: Dec. 20, 2007
CONTACT: Mark Shaffer, Director of Communications, (602) 771-2215

ADEQ Director Owens, Attorney General Goddard Announce Record $12.1 Million Civil Environmental Settlement

PHOENIX (Dec. 20, 2007) – Arizona Department of Environmental Quality Director Steve Owens and Attorney General Terry Goddard today announced a $12.1 million civil environmental settlement, the largest in state history.

The settlement resolves a 2005 lawsuit brought against land developer George H. Johnson, several of his companies, excavation contractor Jack McCall, 3F Contracting, Inc. and Preston Well Drilling. The defendants agreed that the State would be paid $12,111,500 to resolve all claims in the case.

"This record-setting settlement reflects the importance of this case," Director Owens said. "We felt strongly that serious violations of the law had occurred."

Johnson and his companies have agreed that the state will be paid $7 million; 3F Contracting, Inc. has agreed the state will be paid $5.05 million; and Preston Well Drilling has agreed the State will be paid $61,500.

The 2005 lawsuit -- which the Attorney General brought on behalf of ADEQ, the Arizona State Land Department, the Department of Agriculture, the Arizona State Museum and the Arizona Game and Fish Commission -- charged the defendants with numerous violations of state law and destruction of natural and archeological resources, including:

- Bulldozing and clearing of nearly 270 acres of State Trust Lands located in and near the Ironwood National Monument and the Los Robles Archeological District.
- Bulldozing and clearing an estimated 2,000 acres of private lands in the Santa Cruz River Valley without obtaining permits required by state law.
- Destroying portions of seven major Hohokam archeological sites, circa A.D. 750-1250.
- Destroying more than 40,000 protected native plants on State Trust Lands, including Saguaro, Ironwood, Mesquite, Palo Verde and other protected species.
- Violating the state's clean water laws by failing to secure required permits and discharging pollutants into the Little Colorado River, the South Fork of the Little Colorado River and tributaries of the Santa Cruz River.
- Negligently causing a disease epidemic that resulted in the death of at least 21 rare Arizona desert bighorn sheep and serious injury to numerous others.

"We are committed to enforcing our environmental and heritage protection laws to preserve the priceless resources that make this state unique," Attorney General Goddard said. "This resolution sends a strong message to anyone who would despoil our heritage."

PHOENIX
MAGAZINE

PRINT

DISSECTING ARIZONA

Author: Jana Bommersbach
Issue: February, 2008, Page 130

THOUSANDS OF SAGUAROS UPROOTED.
DOZENS OF BIGHORN SHEEP KILLED.
RIVERS RAVAGED.
GEORGE H. JOHNSON HOLDS THREE STATE RECORDS
THAT BEG THE SAME QUESTION:
IS HE THE WORST DEVELOPER IN ARIZONA?

Illustrations by Gilbert ford

If it's three strikes, you're out, then Scottsdale developer George H. Johnson has struck out, leading the league with the dubious distinction of one of Arizona's most rogue developers.

It's a pretty outrageous title in a state known for bad developers, but both state and federal officials say he stands above them all.

In December, the State of Arizona – where an unprecedented five state agencies were suing him – settled with Johnson for a record repayment for despoiling state land, damaging a southern Arizona river and creating havoc in one of America's newest national monuments.

Although the settlement includes the caveat that Johnson makes no admission of liability, it also provides that he repay the state agencies $7 million. Earlier, the bulldozer company he hired, 3F Contracting Inc., agreed to settle for $5.05 million, making this $12.05 million settlement the largest civil environmental recovery by state agencies in the history of Arizona, officials say.

But this wasn't the first time, or even the second, but the third time Johnson has made state history by paying the largest fines ever assessed against a developer. And his troubles aren't over yet. The Environmental Protection Agency has a massive lawsuit against him that stands out for the enormity of what it charges he did to the Santa Cruz River.

Just what in the world did this developer do to bring such heavy weights down on his head?

In a blog he's been writing for two years called The Johnson Report, Johnson asserts his innocence and contends officials have targeted him unfairly. He says Arizona media have portrayed him in a bad light, making him out to be a monster that he's not. It's "as if Atilla (sic) the Hun were let loose upon Arizona," he writes.

Officials say developer George Johnson has done the most dastardly things to Arizona. They say he trespassed on state and federal land – including land in one of America's newest national monuments – and bulldozed some 270 acres without permission. They call it "moonscaping," saying his work "resembles the aftermath of a nuclear blast" or "looks like an unpaved parking lot."

They say that without any of the required permits, he did the same thing to another 2,000 acres, which he first claimed to be "ranching" then said he was using it to build the state's eighth largest city with some 67,000 homes for 175,000 people.

They say he caused "irreparable damage" to seven archeological sites on state trust lands owned by the people of Arizona, including more than one-third of a 110-acre Hohokam Village that was active from 750 to 1250 A.D.

They say he polluted and diverted the Santa Cruz River, wiping out a wetland area for the endangered pigmy owl and causing flooding on Indian land downstream.

They say he caused the injuries and deaths of at least 21 protected Arizona desert bighorn sheep in a bizarre attempt at farming that proved he didn't know the difference between cattle pens and pens for much smaller goats (the sick animals escaped and invaded a national preserve, causing havoc in Arizona's largest bighorn herd).

All of this happened in southern Arizona near the small town of Marana. But no matter how small the town, it happened in a state where few people – especially a developer who's been in business more than 30 years – can claim ignorance of Arizona's efforts to protect the desert.

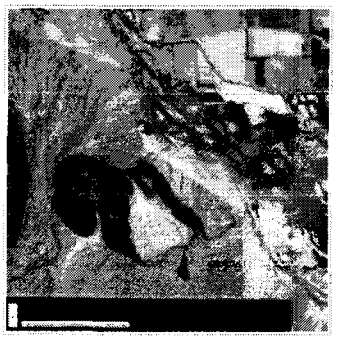
The state says Johnson may have bulldozed thousands of saguaro cactuses without acquiring a single permit to move the plants (each saguaro carries a $10,000 fine per plant for being uprooted).

Even a popular children's book, Deserts, by Nancy Castaldo, notes spells out that this is a no-no: "Efforts to protect saguaro cacti and other native plants from collecting and damage have led to laws in Arizona that require individuals to obtain a permit from the state to remove or relocate any native plant on their property. This even holds true for property owners who want to move a cactus from one end of their property to the other."

The land, called La Osa Ranch, is part of a national plan to preserve habitat while accommodating development called the Sonoran Desert Conservation Plan.

Officials for several Arizona oversight agencies were so disgusted with what they say Johnson did, that in February 2005, Attorney General Terry Goddard filed an unprecedented suit against him on behalf of five state agencies: the Department of Environmental Quality, the Land Department, the Game and Fish Commission, the Agriculture Department and the Board of Regents on behalf of the Arizona State Museum.

"I don't think we've ever had a case [against a developer] involving multiple agencies," Goddard says.
But Arizona isn't alone in accusing Johnson of breathtakingly bad acts. The Environmental Protection Agency is also suing him in a case that could mean tens of millions of dollars in fines and the demand that he restore the Santa Cruz River to its original state.
"This is a big clean water case for us," says Jessica Kao, an attorney for the EPA's regional office in San Francisco, which monitors activity in Arizona. "This type of lawsuit is not unusual, but the scope and seriousness of the case makes this stand out."
What else stands out is that this isn't the first time Arizona officials have been enraged about Johnson's approach to development. Before he ever touched La Osa Ranch, Johnson had already made Arizona history for unsavory development with his "Johnson Ranch" project in the southeast Valley.
For that project, Johnson received the largest fines ever imposed by two different state agencies. In 2003, the Department of Environmental Quality fined him $80,000 after finding that he had drilled three illegal wells and pumped water without any groundwater rights – an activity that is strictly governed and requires permits from the State of Arizona.
At the same time, the Department of Water Resources fined him $90,000 for what they've called a "massive discrepancy" on the groundwater used for Johnson Ranch. Johnson is supposed to replace all the groundwater he uses at the ranch, but the reports don't add up, and *it appears* he's using far more than he's replacing, according to the department. Company officials say the problems were simply oversights or paperwork errors and promised to fix everything.



Left: May 2002
Right: June 2004

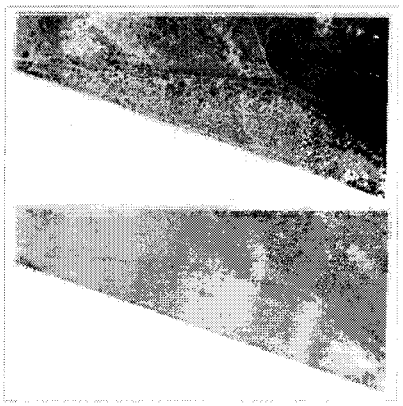
May 2002

George Johnson turned down an interview request from PHOENIX magazine, but his side of the story is available on The Johnson Report, the blog he's been keeping since 2006 (thejohnsonreport.com).
In thousands of words, he rails against Arizona's "fabricated case" against him and claims he is being singled out.
He also believes his Johnson Report is a potent force and that it is scaring state officials into realizing "they made a grave mistake in starting this fight."
Johnson maintains he did nothing wrong. For instance, when accused of destroying native plants, he writes, "The state is under the impression that every rancher and entity in Arizona asks permission to trim trees and clear brush on private land."
When accused of blading over thousands of acres, he writes, "The state is still having trouble accepting the fact that clearing pastures is standard ranching practice."
And when told that Arizona has 250 witnesses ready to testify against him, he chides that the state is looking for more "dirt" on him and wonders why they'd need more if they already had so much.
"Sounds like desperation to me," he writes.
Johnson originally responded to the state lawsuits by countersuing Arizona. He demanded it drop the suits and sought $33 million in damages, claiming the charges were nothing but a "get George Johnson campaign." His complaint stated: "The individual defendants have intentionally denied Mr. Johnson equal protection under the law by treating him as a class of one and subjecting him and his business entities to a punitive enforcement scheme not endured by other persons or entities in Arizona."
The countersuit was ultimately dismissed in December as part of the settlement. So was a suit Johnson filed against Attorney General Terry Goddard and his wife Monica, claiming Goddard "defamed" him when he announced the lawsuit as "wanton destruction of Arizona's heritage resources."
Goddard claimed he had "absolute immunity" from such suits in carrying out the duties of his office. The Arizona Republic's editorial page weighed in on Johnson's counterattack, arguing the state's top lawyer has "an absolute need to speak freely" about suits he files.
Johnson said in his blog that he has been mostly misunderstood. "I have lived in Arizona all my life," he said in his first blog entry on July 1, 2006. "I love this state as my father before me loved this great state. I have been in business here all my life and have made many contributions to this state, some of which I am proud to say bear our family name."
But he bemoans that the Arizona lawsuit has left nothing but a negative impression of him. "My business activities have come under scrutiny for a number of reasons, and the papers write about these events as if Atilla (sic) the Hun were let loose upon Arizona."
Mention the La Osa Ranch story to anyone and *you'll find they're speechless about the enormity* of the destruction there. Some say they still can't believe this could have happened – not in this day and age, not in broad daylight, not even in a state that has a sordid history of development.
For a long time, it seems Arizona developers didn't much care how the state grew, just that it grew – that they could overcome an unforgiving desert and turn millions of acres of real estate into something of value.

The development boom came after air-conditioning was developed around World War II. Soldiers who had trained at air bases that once book-ended the Valley made good on their vows to return if war didn't claim them. Construction became Arizona's sixth "C" - joining the legendary five staples of Arizona's economy (copper, cattle, cotton, climate and citrus) - and entire towns were built.

Phoenix went from a small town of 48,000 in the 1930s to the nation's fifth-largest city today. Communities throughout the state grew and grew.

By the 1970s, Arizona scandalized the nation with sweeping incidents of land fraud. Thousands of "investors" found they hadn't bought a piece of paradise but a chunk of raw desert without water, roads, power or the possibility of habitation. It was painfully obvious that this kind of rip-off reputation wasn't good for business, and there was a growing outcry - both from outside the state and from within - that careless development was going to soil the sandbox for everyone.



Above: May 2002
Below: June 2004

So Arizona began the serious task of passing laws and regulations - grading, drainage, land-use planning, hillside ordinances, water assurances, master plans - to overcome the negative image.

Development - a major economic engine in the state - can be found in all forms today. Some developers build look-alike houses mile upon mile while some attempt to create more unique "neighborhoods" that attempt to stand out among the crowd. One or two are even building sterling reputations as sensitive, environmentally friendly developers.

By any measure, Johnson's La Osa Ranch ranked at the bottom of Arizona development. His land sat near the small town of Marana, just north of Tucson in southern Arizona, close to the Pinal and Pima county lines. It also was near the Ironwood Forest National Monument and the Los Robles Archaeological District - both protected, restricted areas meant to be kept in pristine condition.

In addition, it was within striking distance of military flight patterns and helicopter training facilities of the Western Army National Guard Aviation Training Site.

This open desert north of Tucson is one of the ripest spots in the state for development. A dozen massive subdivisions have been approved, promising to bring nearly 200,000 housing units with a half-million new residents to an area that's currently considered rural.

The Town of Marana pays incredible attention to all this development, watching through satellite imagery just how its land is changing. The town even employs a satellite analyst, Chris Mack, and it was he who first noticed what was going on at La Osa Ranch.

As he told Government Technology magazine in 2005: "We started hearing in December 2003 through various environmental groups of this proposed La Osa Ranch development and some of the allegations of illegal land clearing. I looked to see if our imagery covered the area and, at that time, we had two dates of imagery - May 2002 and May 2003. I spotted the site in question fairly readily because there was a start of land clearing activities, and you could see bulldozer tracks in the area of interest."

By 2004, the extent of the damage could clearly be seen from space, Mack adds, and as the magazine described, the images resembled "a lunar landscape or the aftermath of a nuclear blast."

In the pictures he gets from space, Mack knows that vegetation shows up as red while dirt shows up as gray. In the first pictures he had, La Osa Ranch was awash in red. By 2004, there wasn't a bit of red to be seen on the entire 2,270 acres. The land had been "scraped clean" of some 40,000 native plants, including thousands of state-protected saguaros, the state's lawsuit says.

The state trust lands - held in trust for the benefit of the state's public school system - along the western border of Johnson's property are within the boundaries of the Ironwood Forest National Monument, established in 2000. The suit notes President Bill Clinton's observations about this land when he gave it federal status:

"The landscape of the Ironwood Forest National Monument is swathed with the rich, drought-adapted vegetation of the Sonoran Desert. The monument contains objects of scientific interest throughout its desert environment. Stands of ironwood, palo verde and saguaro blanket the mountain floor beneath the rugged mountain ranges, including the Silver Bell Mountains.... The desert bighorn sheep in the monument may be the last viable population indigenous to the Tucson basin."

In addition, the state notes that portions of the land "are so rich archaeologically that they have been designated on the National Register of Historic Places as within the 'Los Robles Archaeological District.'"

In all, this district includes 119 sites that once represented "a large and successful hub of trade, manufacture, agriculture and ritual/political life" of the Hohokams. While most Hohokam sites around Arizona have disappeared, this area "has survived almost intact, and thus offers a unique opportunity to study all the levels and components of Hohokam community life," the state notes.

When Johnson bought the land for his company, it was designated in Pinal County's comprehensive plan as "development sensitive" and "rural." He soon asked that its zoning be changed to "transitional," and on October 15, 2003, he submitted a detailed plan for a Planned Area Development (PAD), which included 67,000 homes, a resort, golf courses and businesses. Basically, it was supposed to be a city twice the size of Flagstaff.

Some saw it not as a planned community but as a "sprawl city" that would damage the area and eventually force the closure of the military installations nearby. When Johnson was confronted with this opposition, he argued that Pinal County would be "illegally" taking his property without compensation if it denied him the zoned he wanted.

Not so fast, the state's largest newspaper said, with an editorial titled, "Sorry, George, That One Won't Fly." The Arizona Republic reminded him that he didn't have a right to new zoning. "That's

why the whole procedure is called a zoning 'request,' not a zoning 'guarantee,'" the editorial chided.
None of the opposition seemed to stop Johnson, according to the state.
"Johnson International's requests to Pinal County generated considerable public concern and/or opposition," the suit contends, "including concerns about the impact that the proposed development may have on the adjacent Ironwood Forest National Monument, the archeological sites within the Los Robles Archeological District, the Santa Cruz River, the area's riparian habitat, the bighorn sheep in the Silver Bell Mountains, areas of religious and cultural significance to native Americans, and endangered species such as the Pygmy Owl.
"Nevertheless... even as Johnson International's requests were being considered, Defendants already had bulldozers and other earth moving equipment clearing and leveling substantial portions... of the proposed development, trespassing on State Trust Lands, destroying protected native plants, filing in water courses, discharging pollutants, irreparably damaging ancient and historic archeological sites, and otherwise ignoring numerous laws applicable to developers in their position."

"I haven't seen a lot of George Johnson types," says attorney Mike Smith of the National Trust for Historic Preservation. "He is one of the more prolific bad actors."
Smith, speaking from his office in Washington, D.C., says his national group got involved in the controversy because Johnson's land was so close to a national monument.
"There's something more universal about George Johnson and what he represents, especially in an area like Arizona where there are a tremendous number of unidentified cultural resources," Smith says. "It seems his approach as a developer is, he just does it and deals with the repercussions later. That usually means fines. That approach is unacceptable."
It's not uncommon for development and protected sites to clash, he notes, but there's a way to deal with that, and that's by acquiring permits needed to make major changes on land.


Photo courtesy of Arizona Desert Bighorn Sheep Society, Dave Pence

"Usually a developer is going through the permit process, and that's how we discover problems," Smith says. The permits spell out the intended changes on the land, and that's when officials can debate with developers about what's acceptable.
This case was so different because, although Smith says the law is clear that Johnson needed permits, he not only didn't have them, he didn't even apply for them.
Johnson first contends in his reply to the state lawsuits that he didn't need permits to do his "ranching and farming" activities – noting this property has been ranchland for hundreds of years – but he also maintains the grading was a "mistake" by a subcontractor and not his fault.
Carolyn Campbell is one of the environmental leaders of southern Arizona that sounded an alarm about George Johnson. She heads the Coalition for Sonoran Desert Protection and has worked for years to hammer out a compromise with developers in southern Arizona to respect the land. The landmark Sonoran Desert Conservation Plan, adopted in 1998, has been recognized nationally as a smart and effective way to preserve both habitat and threatened species while accommodating new development.
Campbell also was instrumental in getting the federal government to create the Ironwood National Monument. "It was a big deal to us getting 129,000 acres as a national monument," she notes.
So she took particular interest in what Johnson was doing.
"It wasn't much fun working with him," she says in a telephone interview. "After seeing some of the things George Johnson did on the land, it is hard for me to see any of them as accidental. Who bulldozes a river by accident? Without a permit? Who puts in a concrete culvert by accident? How can you not know? I watched him in public meetings and how he treated everyone – my mouth was wide open that anybody could be that insensitive. He wouldn't meet with us. We tried, but he dismissed any environmental concern."
Campbell adds, "I've worked with a lot of developers in Pima County. From small to big, the whole gambit. And I haven't worked with someone like him. Maybe that's how they grow them in Phoenix. Hopefully, I'll not have to deal with someone like him again."

Then there's what George Johnson did to Arizona's largest herd of bighorn sheep – owned by the citizens of Arizona – and the horrible suspicion that it wasn't an "oops" mistake.
The state's lawsuit lays it out in dry, legal terms: "Upon information and belief, during August–December 2003, Defendants caused between four and five thousand domestic goats to be located on the La Osa Project.... At all times relevant hereto, Defendants knew or should have known that there was a herd of desert bighorn sheep that ranged in or around the Silver Bell Mountains, southwest of the La Osa range. Defendants further knew or should have known that domestic goats can directly transfer certain diseases to desert bighorn sheep."
Johnson knew all of this, the suit contends, because the grazing lease he had with the state of Arizona specifically states: "To protect desert bighorn sheep: No domestic sheep or goat grazing will be authorized on public lands within nine miles surrounding desert bighorn sheep habitat."
The La Osa range is within nine miles of the Silver Bell Herd, the suit notes.
Brian Dolan, the president of the Arizona Desert Bighorn Sheep Society, remembers a more horrifying version of what happened when George Johnson decided to "raise goats" on the "ranch"

he was trying to develop into thousands of houses.
"He brought in several hundred diseased domestic goats from Texas and put them in a private pasture near Ironwood," Dolan recalls. He says Johnson had barbed-wire fence that was inadequate – it was meant for cattle, not goats. Several hundred diseased goats escaped and trespassed into lands managed by the state and federal Bureau of Land Management.
"They infected the bighorn with two diseases," he says. "One caused temporary or permanent blindness. The other was a viral disease that creates open sores. A number of bighorns died, probably one-fourth or one-third of the herd [an estimate of 75 to 100 animals overall]. I saw some pretty disturbing video of blinded sheep running head-on into saguaro cactus. It was like watching sheep commit hari-kari."
Dolan says it took two months of complaining about the goats getting out of the flimsy pens before anything was done. Johnson told him he was sending out "cowboys" to round up the goats, but they weren't getting rounded up. Dolan says he regularly called the BLM, Game and Fish, and Johnson with his concerns.
"It was so frustrating to me," Dolan says. "The whole time everybody thought it would go away. Finally, even Johnson himself realized the problem and said, 'go out and shoot them.' It took six to eight weeks to kill all the goats."
By then, the infections had set in and sheep were dying. "It was just unbelievable," Dolan says. Game and Fish officials arrived in helicopters, trying to land on the rugged mountains to get vaccines to the sick bighorns. "It was at great expense and a great difficulty," Dolan adds. "One guy broke his hand. They had to jump out of the helicopters to get to the sheep. It was pretty difficult."
In all, the state charges, despite their efforts to provide medical care, at least 49 sheep suffered "serious symptoms" including blindness, scabbing and bleeding of the mouth. At least 21 died "from malnutrition, falling from the steep terrain or the inability to evade predators."
Environmentalist Carolyn Campbell says she got very suspicious about those goats when Johnson was warned that the bighorn sheep herd near his land was "an issue" in considering his proposed development. She remembers this: "Mr. Johnson said, 'Don't worry about the bighorn sheep, they will not be an issue.' What does that mean? I have to think this wasn't a whole series of accidental 'oops.'"

Dolan verbally recoils at the thought: "God, I hope it wasn't on purpose – that would be too diabolical. But it wouldn't surprise me that the reason the goats were out there was not for legitimate reasons. Maybe for a tax scheme. Johnson isn't a livestock owner, he's a developer."
Dolan says he has never seen anything like this and hopes he never will again.
"This is the first time we've had problems with such carelessness," he says. "The goats were put there in such a careless fashion, and when they escaped there was a reckless response. If it occurred again, I'd be more tenacious in demanding a more expedient response."
Dolan had already been deposed and was ready to testify had the state's lawsuits gone to trial. He says he'll always remember this as "a real mess."
Also ready to take the stand – in fact, the first witnesses the attorney general's office intended to call – was Bruce Babbitt, the former governor of Arizona and a former secretary of the interior. He counts getting the National Monument status for Ironwood as one of his proudest achievements.
Meanwhile, Johnson was denied his rezoning request on La Osa Ranch and has since sold the land.
The civil suit didn't seek a specific amount of damages but asked the court to impose fines as required by law – sometimes seeking triple damages and punitive damages. For the water-quality issues alone, the state was asking for $25,000 per day for violations that spanned a couple of years.
The suit had gotten strong editorial support from The Republic. "We hope the state prevails and that the final tab is hefty," it said in a February 20, 2005 editorial. "Not just to penalize Johnson and his associates, although the actions described in the lawsuit richly deserve punishment. But in a state where growth is king, this legal action sends an important message that developers can't flout the rules without consequence.
"They can't write off environmental damage as a cost of doing business. And they can't violate our heritage."
Now, in an entirely separate situation, the Environmental Protection Agency (EPA) wants tens of millions of dollars from Johnson.
In November 2005, it filed a massive suit charging that Johnson and two of his companies violated the federal Clean Water Act by filling more than 100 acres of the Santa Cruz River and its tributaries with dirt and debris during 2003 and 2004.
The EPA says he stripped stretches of the riverfront, including one of the river's last mesquite bosquets in one of the Sonoran Desert's wettest riparian forests.
It was devastating destruction, the agency says, so it sued to force Johnson not only to "restore" the area – a job that would cost millions – but also fined him up to $32,500 for every day the law was broken and the damage lasted.
If the courts find a single violation that lasted a year, the fine would top $10 million. But the EPA is not charging there was just one violation. Its officials tallied violations for each time a bulldozer dumped dirt in the river. They say the damage could have spanned nearly two years.
Johnson has called the suit "baseless" and denies the claims, saying whatever grading was done was in an isolated wash, not in the river or a tributary. He also contends the wash fails to meet federal standards as a navigable stream that would bring it under the reaches of the Clean Water Act.
A prepared statement in response to the suit reads: "It is preposterous to say that a small wash in the middle of the Sonoran Desert is a navigable water."
Kao, the EPA attorney in San Francisco, says the suit is in the discovery stage and no court date has been set as of press time. It could be years before the case ever gets to court.
These days, the land called La Osa Ranch lies silent, looking like a swath of dirt from outer space. Native grasses and plants are attempting to grow back along the Santa Cruz River, as desert plants have done for centuries in a climate where weaker varieties wouldn't even try.
Will the record $12.05 million settlement against Johnson alert other developers that the State of Arizona is serious about reining in outrageous behavior and protecting its land?
Terry Goddard would tell you he certainly hopes so.

Attachment C

Department of Justice

FOR IMMEDIATE RELEASE
Tuesday, October 7, 2008
WWW.USDOJ.GOV

ENRD
(202) 514-2007
TDD (202) 514-1888

Arizona Developer Agrees to Settle Clean Water Act Violations Along the Santa Cruz River

WASHINGTON — An Arizona land developer and a contractor have agreed to settle alleged violations of the Clean Water Act for bulldozing, filling, and diverting approximately five miles of the Santa Cruz River, a major waterway in Arizona, the Justice Department and U.S. Environmental Protection Agency announced today.

According to the settlement, Scottsdale, Ariz.-based developer George H. Johnson, his companies Johnson International, Inc.; and General Hunt Properties, Inc.; and land-clearing contractor, 3-F Contracting, Inc. will pay a combined $1.25 million civil penalty. The penalty is the largest obtained in the history of EPA's Pacific Southwest Region, and one of the largest in EPA's history, under Section 404 of the Clean Water Act, which protects against the unauthorized filling of federally protected waterways through a permit program administered jointly by EPA and the U.S. Army Corps of Engineers.

The settlement resolves a Clean Water Act complaint filed in 2005 by the Justice Department and EPA against Johnson and his companies for clearing and filling an extensive stretch of the lower Santa Cruz River and a major tributary, the Los Robles Wash, without a permit from the Corps of Engineers.

"A seven-figure penalty in this type of enforcement case is virtually unprecedented," said Ronald J. Tenpas, Assistant Attorney General for the Justice Department's Environment and Natural Resources Division. "It underscores the Justice Department's commitment to enforce the nation's laws that protect valuable water resources in Arizona and other arid western states, and to hold violators of those laws accountable."

"The Santa Cruz River is a gem in Arizona's crown, as it flows from Arizona to Mexico back into Arizona, sustaining life, habitat for animals and plants, and providing so many benefits for residents of southern Arizona," said Alexis Strauss, director of EPA's Water Division for the Pacific Southwest Region. "This settlement reflects both the strong emphasis EPA places on protecting this important watershed and the seriousness of the alleged violations."

"Today's action contributes to EPA's record-shattering enforcement results," said Granta Nakayama, assistant administrator for EPA's Office of Enforcement and Compliance Assurance. "To date, EPA has concluded enforcement actions requiring polluters to spend an estimated $11 billion on pollution controls, clean-up and environmental projects, an all time record for EPA. After these activities are completed, EPA expects annual pollution reductions of more than three billion pounds."

The alleged violations occurred in 2003 and early 2004, when defendants bulldozed 2000 acres of the historic King Ranch and La Osa Ranch in Pinal County, Ariz. The bulldozed areas lie within the largest active floodplain of the lower Santa Cruz River, which meanders through the two ranches in natural braids, a rarity for this heavily channelized waterway. Prior to defendants' land-clearing activities, this stretch of the Santa Cruz River supported a rich variety of vegetation, including one of the few extensive mesquite forests remaining in Arizona's Sonoran Desert region. These areas form a critical corridor for wildlife to move along the Santa Cruz River and from Picacho Peak State Park to the Ironwood Forest National Monument.

The case was referred to EPA by the Corps of Engineers after concerned citizens, tribes, and local, state and federal agencies complained about the serious flooding dangers and ecological impacts in connection with defendants' land-clearing activities. The Johnson defendants sold the ranches in 2004.

The proposed consent decree, lodged in the U.S. District Court in Phoenix, is subject to a 30-day comment period and final court approval. A copy of the proposed consent decree is available on the Justice Department Web site at www.usdoj.gov/enrd/Consent_Decrees.html.

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08-902

Tribune
EAST VALLEY · SCOTTSDALE

June 11, 2008

ACC members pursue probe into Q.C. sewage spills

By Sarah Boggan
Tribune

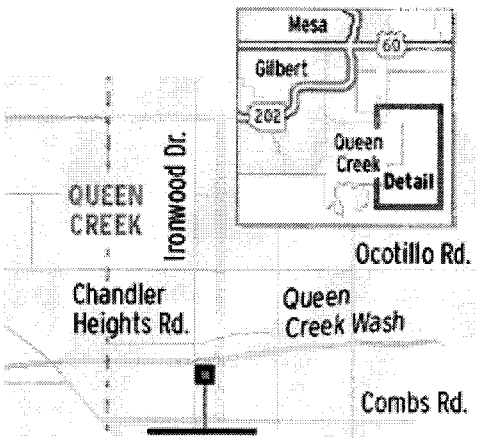
A sign posted on a fence blocking access to the Queen Creek Wash warns of the presence of E. coli in the water in the wash in Pinal County near Queen Creek.

Tribune

Some Arizona Corporation commissioners are calling for a prompt and thorough investigation of Johnson Utilities after state environmental officials said the company is operating a water reclamation plant at half the capacity it should be.

Probe cites Johnson Utilities in sewage spill [http://www.eastvalleytribune.com/story/117978]
Johnson Utilities must post warnings near spill [http://www.eastvalleytribune.com/story/117230]
Raw sewage spill irks Pinal residents [http://www.eastvalleytribune.com/story/116767]

Commissioner William Mundell said in a letter to other commissioners Tuesday that he is "deeply troubled" by actions at the plant that led to two sewage spills, sending more than 10,000 gallons of raw sewage into Queen Creek Wash and an adjacent neighborhood. He is worried the spills could lead to health and safety issues for residents.



"The company has a lot of explaining to do," he said.

Calls to Johnson Utilities went unreturned Wednesday. Employees said Vice President Brian Tompsett was on vacation and unavailable.

Mundell, who wants to schedule a special open meeting on the matter, said the capacity issue cited last week in an Arizona Department of Environmental Quality violation notice for the two May spills, "raised red flags."

Last week's DEQ notice said several state laws were violated, but one stood out to Mundell. The violation showed Johnson Utilities did

not abide by the 2004 state-approved engineering design that requires two 75 horsepower pumps to be used at the company's Pecan Water Reclamation Plant. At the time of the spills, the company only had two 35 horsepower pumps operating at the station. Just two years prior to that, the company only had two 20 or 25 horsepower pumps in place.

"There's a big difference between 75 horsepower pumps and 35 horsepower pumps," Mundell said. "That could have been the major cause of the overflows. I'm deeply concerned about the discrepancy between the (existing) pump size and the pump size listed in the engineering report."

The DEQ notice centered on the company's Pecan Water Reclamation Plant. But the DEQ's file on Johnson Utilities also reveals a long history of environmental violations and systemwide sewage spills, including one in December at the same plant where more than 5,000 gallons of raw sewage was discharged into the wash and Pecan Creek neighborhood. The Scottsdale company, owned by developer George Johnson, serves thousands of customers in the Johnson Ranch area, unincorporated areas of Pinal County to the south and east of Queen Creek and a portion of Florence.

DEQ and county health officials have warned people to stay away from standing water in the wash because E. coli levels found there could be harmful to people. DEQ also requires the company to monitor the E. coli levels.

Commissioner Jeff Hatch-Miller said he was concerned when he initially learned about the sewage spills and continues to worry about the health and safety of nearby residents. He also questions the company's practices.

"I'm asking that an engineer of our own be sent out to verify every aspect of the plant," he said.

Hatch-Miller said once the report is done, commissioners will decide whether a special meeting on the case is necessary.

DEQ officials have also said they plan a thorough look at the plant's operations, saying "the pumps were the most apparent thing."

The notice gives Johnson Utilities until July 5 to install and provide written and photographic evidence of the installation of two 75 horsepower pumps.

Mundell said the company will soon be before the commission for a rate case. He said rate cases can take months and the information the company provided in March was "deemed insufficient" because Johnson Utilities officials did not provide enough details in required reports.

In light of recent events, Mundell said he wants Johnson Utilities to face more scrutiny and has asked for a special open meeting if a rate case cannot be completed quickly.

"A rate case can take months because it's like a trial," he said. "I didn't want the company to control the pace of our investigation. I didn't want to tie the public health and safety issue to the rate case - I want to deal with it immediately so it doesn't happen again.

Mundell said a special meeting would allow the public to speak before the commission, express concerns and ask questions of the company so the commission can get to the bottom of the sewer issues.

Adam Stafford with Mundell's office said the company was ordered to file the rate case because it had never filed one. Records show Johnson Utilities began operations in Pinal County in 1997.

"The commission and the staff want to see what they're up to," Stafford said.

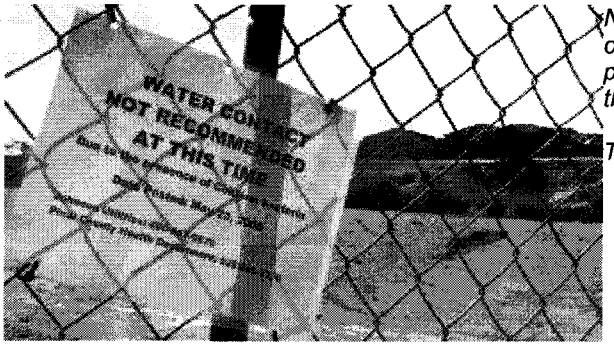
Mundell said the commission would also decide on what, if any, sanctions would be imposed on Johnson Utilities, including restricting the company from being a sewer provider in the future.

Tribune
EAST VALLEY · SCOTTSDALE

June 17, 2008

Residents worried about effects of sewage spills

By Sarah Boggan
Tribune



NOT SAFE: Water sits in the bottom of the Queen Creek Wash outside the Johnson Utilities water reclamation plant. The plant's pumps backed up earlier this year, causing raw sewage to leak into the streets of the nearby community of Pecan Creek.

Tribune

Pecan Creek residents who have watched untreated sewage flow into their streets and nearby Queen Creek Wash are worried about how the sludge could affect their health.

Probe cites Johnson Utilities in sewage spill [http://www.eastvalleytribune.com/story/117978]
Johnson Utilities must post warnings near spill [http://www.eastvalleytribune.com/story/117230]
Raw sewage spill irks Pinal residents [http://www.eastvalleytribune.com/story/116767]

Pinal County health officials are concerned about keeping people away from infected water in the wash and say they haven't had any reports of illness associated with the spills.

But 8-year-old Maddy Riffey spent five days in a Mesa hospital after contracting a dangerous E. coli infection last month.

And now Riffey's family, who lives within 300 yards of Queen Creek Wash, worry and wonder if their daughter was sickened by the contamination. The wash is the same one where thousands of gallons of raw sewage have been discharged in recent months from Johnson Utilities' Pecan Water Reclamation Plant.

The most recent spills were May 17 and 18. More than 10,000 gallons of untreated sewage poured into neighborhood streets and the wash.

An earlier spill was reported to the state in December and residents say another discharge occurred in February.

Riffey was taken to the emergency room on May 14, before the most recent spills, and put through a battery of tests and placed on morphine for pain. Pinal health officials think the spills and Riffey's illness are unrelated due to timing.

"After we became aware of the spills it became a health and safety concern," said Matt Riffey, Maddy's father. "After our daughter got sick we thought there might be a connection. The timing doesn't seem quite right, but it's a big concern knowing that there's E. coli in the area."

Documents from the Arizona Department of Environmental Quality show a long history of environmental violations by the company, including sewage spills.

Pinal County health officials said standing water in the wash, which DEQ officials say has been there since January, could contain anything from E. coli to hepatitis and have warned people to stay out of the wash and the water.

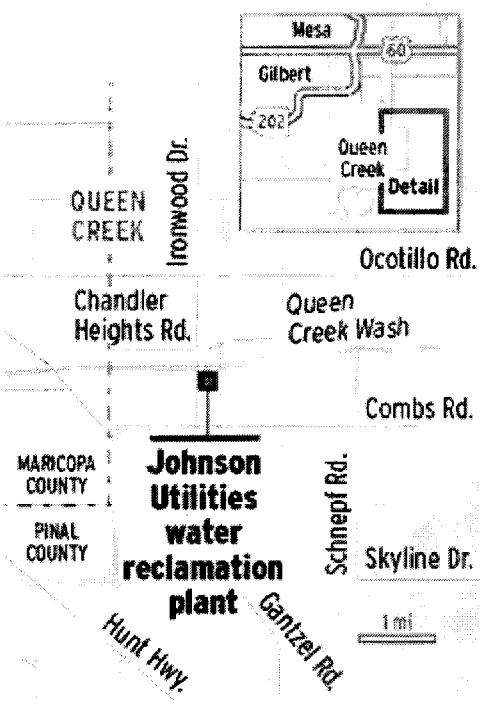
DEQ required Johnson Utilities to post signs around the wash warning that contact with the water could pose a health risk. The Pecan Creek homeowner's association put up a fence to block access to the wash.

A state-administered test of water following the May spills showed chart-topping levels of E. coli and fecal coliform. Information provided by Johnson Utilities officials shows those levels have improved a month after the spill.

Johnson Utilities officials said sewage that oozed into the wash and out of manhole covers in the streets was treated with chlorine, sucked up and taken away in DEQ-approved trucks.

State regulators documented a December spill and residents say there could be more that were not reported - one was witnessed on Super Bowl Sunday.

Maddy Riffey's illness prompted her parents to talk with neighbors, warning them about the spills and the health risks.



Gabriel Utasi/TRIBUNE

"We're all concerned for the health and safety of our children," said Maddy's mother, Denise Riffey. "It's not a vindictive agenda. It's just wanting to have a safe environment for our kids and also to make sure we have some property value when it's time to sell and move on."

Denise Riffey said her family used to ride ATVs in the wash but now they avoid it. She said her children do not play there and, while there's no definitive link between sewage and her daughter's illness, she said no one else in her family got sick and they all eat the same food.

Johnson Utilities Vice President Brian Tompsett said in an e-mail his company is "always concerned over the health, safety and welfare of all residents in the community." But, he said, Riffey's illness is unrelated to the company's operations.

"I'm sorry the residents are concerned over the recent spill associated with the Queen Creek Wash, but ... storm water naturally contains levels of E. coli from storm runoff associated with cattle, dogs, etcetera," he said. "I'm sure the storm water has always had levels of E. coli in it since January 2008 (when the pond formed)."

In an earlier interview, Tompsett said the May and December spills were caused by plant pumps getting clogged with debris that should not be flushed into the system - cloth, mop heads, baby wipes and wires.

"In this particular case the amount and the timing of all the debris coming in is very unusual," Tompsett said. "It's higher than normal, it's higher than other parts of our system and I know it's higher than other parts of other systems."

Pecan Creek residents including Kristi Fisher are outraged that Tompsett sounds like he's blaming sewer users for overtaxing the system and causing the spill.

"Their VP came out and was quoted in the news saying it was the residents' fault," Fisher said. "If he wants to come to my house, he can come and try and get that down the toilet. That is going to back up in my house. That isn't going to back up his system."

A state investigation shows the plant was not built to approved specifications because it only has two 35 horsepower pumps instead of the two 75 horsepower pumps approved by the state. DEQ gave the company until July 5 to make that change.

Tompsett said the company replaced the 35 horsepower pumps with 100 horsepower pumps in the last week. It also put out a pamphlet on sewer back-up prevention including tips on what not to flush.

Residents say they want change and hope to see more action by Johnson Utilities to take care of the issue.

"I don't think anyone here wants to see Johnson Utilities go under ... but they want to see them do the right thing," Matt Riffey said. "We pay a lot of money for the service. When you flush the toilet that should be the end of it. Done."

Attachment F

Tribune
EAST VALLEY • SCOTTSDALE

June 27, 2008

Johnson sues 2 San Tan women for defamation

By Sarah Boggan
Tribune

UNSAFE WATER: Water sits at the bottom of Queen Creek Wash outside the Johnson Utilities water reclamation plant on June 17. A sign posted on a fence blocking access to the wash warns of the presence of E. coli in the water in the wash in Pinal County near Queen Creek.

Santan-area residents who have challenged developer George Johnson on the safety of their water and sewer are being sued by his company for defamation.

Residents to protest Johnson Utilities event [http://www.eastvalleytribune.com/story/118801]
Raw sewage spill irks Pinal residents [http://www.eastvalleytribune.com/story/116767]

Pinal County residents Bambi Sandquist and Kristi Fisher were named in a lawsuit filed by Johnson Utilities this week in Pinal County Superior Court. They are accused in the lawsuit of posting defamatory statements about Johnson Utilities on www.newszap.com [http://www.newszap.com]. The Web forum is run by Independent Newspapers of Arizona, which publishes the Queen Creek Independent newspaper.

Their postings were in regard to recent sewage spills from a Johnson Utilities facility that health officials say pose a public health hazard. State environmental and regulatory agencies are investigating the spills.

Sandquist posted that Johnson should pay restitution to people in the spill area, lower his water rates, which are some of the highest in the state, and require his utility to be regularly audited.

The lawsuit alleges Sandquist and Fisher posted pointed comments on the community Web site forum and helped organize a protest of a company "customer appreciation" event by carrying water bottles containing mock contaminated water, hoisting protest signs and distributing fliers to attendees.

The lawsuit says that the women used the Web site to "publicize that they intended to protest (Johnson Utilities) at the event, to disseminate water bottles bearing false and misleading labels, to wear gas masks and to carry baby dolls dyed blue."

Sandquist is also accused in the lawsuit of slandering the company during a recent local news broadcast about the spills that spewed more than 10,000 gallons of raw sewage into Queen Creek Wash and the nearby Pecan Creek development. To illustrate her concern for potential harm to the company's more than

20,000 customers, Sandquist placed a gas mask on a baby doll for the cameras.

"Is this so bad that we have to put gas masks on our children?" Sandquist asked in an interview Friday.

Sandquist said she was surprised by the lawsuit. She didn't think company owner Johnson would "go after the little guy."

Fisher could not be reached for comment Friday.

Arizona State University journalism professor Stephen Doig said the lawsuit treads on new territory.

"What can be said on blogs and boards hasn't been litigated heavily," Doig said. "There's a world of trouble for people who don't understand that when they make potentially libelous utterances on the Internet they can be held liable."

As a public figure, Scottsdale developer Johnson would have a high burden of proof that his reputation has been stained by an effort to deliberately spread untruths on the Internet, he said.

The lawsuit could affect the willingness of residents to publicly talk about the issue, Doig said.

"All it takes is a hundred dollars to file a lawsuit," he said. "All of a sudden that can be a chilling effect when a process server hits a (citizen) with a lawsuit."

Sandquist said her comments on the Internet forum and the television news segment are protected under the First Amendment, and after recent problems with the utilties, residents have rallied to get answers.

Sandquist is encouraging her neighbors to attend an Arizona Corporation Commission meeting next week where commissioners are reviewing an application to expand the area where Johnson Utilities provides water and wastewater service.

Johnson has come under fire from ACC members who have expressed concern that the utility has spilled sewage and that it failed to build certain parts of its infrastructure to state environmental specifications.

Commissioner Bill Mundell said they will take public comments on the issue.

Johnson Utilities Vice President Brian Tompsett could not be reached for comment Friday.

Attachment G

Tribune
EAST VALLEY · SCOTTSDALE

October 28, 2008

State: Utility violating rules on sewage sludge

By Jason Massad
Tribune

Johnson Utilities has been burying potentially dangerous sewage sludge near one of its wastewater treatment plants in violation of state rules, according to environmental regulators.

Johnson Utilities works on disinfecting wash [http://www.eastvalleytribune.com/story/125918]
Johnson Utilities loses in land dispute ruling [http://www.eastvalleytribune.com/story/124789]
Johnson Utilities ordered to clean up wash [http://www.eastvalleytribune.com/story/120975]

Officials with the Arizona Department of Environmental Quality showed up at a Johnson Utilities sewage plant nine miles southeast of Queen Creek in late September on an unannounced inspection that was launched after an anonymous complaint, according to DEQ records.

They found sewage sludge that would fill half a backyard swimming pool. About 34,713 gallons of the sludge was dumped in various trenches that also held construction debris.

Pictures taken at the scene show houses near uncovered trenches that contain sludge at Johnson Utilities Site 11 sewage plant.

The Department of Environmental Quality last week issued two violation notices and listed 15 separate infractions.

The infractions included failure to ensure that the sludge did not contaminate underground water supplies and failure to test the sludge - also called biosolids - for contaminates.

It's not the only time Johnson has run afoul of DEQ this year. The utility spilled raw sewage in May in a portion of Queen Creek Wash, polluting it for several months before it was disinfected.

"Biosolids are a potential human health hazard when not properly managed," wrote Mark Shaffer, spokesman for DEQ in an e-mail. "They are also very high in nutrients that might pollute drinking water supplies."

Sewage sludge is the byproduct of treating sewage and can contain infectious germs, toxins, heavy metals and nitrogen, according to the federal Environmental Protection Agency.

Johnson Utilities has been disposing of the sludge in landfills under a permit issued by DEQ and is not allowed to dispose or bury sludge at the site it was found.

However, in this instance, Johnson Utilities was simply storing sludge from some of the utility's other wastewater treatment plants at the Section 11 facility, said Lee Stein, an attorney with Perkins, Coie, Brown and Bain, which is representing Johnson.

Johnson Utilities was considering an agreement with another company to transport the sludge to be used as fertilizer on low-value crops - a growing, yet controversial trend in the waste management industry, Stein said.

The business venture didn't end up happening, however. Stein said that since the sludge came from other sewage plants and not the Site 11 facility, it didn't violate any state permitting rules.

Federal guidelines define "temporary storage" of sludge as less than two years, Stein's firm wrote in response to DEQ. "The biosolids in question were stored only for a few months earlier this year," says the response.

"I think ADEQ misunderstands ... they were not biosolids that were produced at the facility," Stein said. "There's a distinction between storing solids from this facility and storing solids from other facilities."

The Department of Environmental Quality's first visit to the sewage plant, however, indicated something different.

Gary Larsen, a representative of the utility, showed ADEQ officials where the sewage sludge had been temporarily stored on the site. However, there were no indications that sludge had been stored there, according to ADEQ documents.

ADEQ inspectors asked to be shown an area where sludge seemed to be scattered on the 640-acre property. They found a large trench where concrete and plastic debris as well as sewage sludge had been dumped, the report says.

Inspectors also found a 6-foot-deep pit where they were standing on biosolids that had already been buried with 2 inches to 3 inches of soil.

After Larsen told the inspectors that a utility backhoe was not in service, the inspectors dug six soil samples and could smell the strong odor of sewage.

The samples will be tested for a host of contaminants, although the department's report says they already know the material is sludge.

Inspectors returned to the sewage plant in early October. Larsen told inspectors that Johnson Utilities had retained an attorney and that he couldn't answer any questions.

Stein said that all of the sludge was moved from the facility after the surprise inspection. He said there was no health risk associated with storing the sludge at the site.

1.15. During the period of 2005 to the present did Utility deliver treated effluent to any Utility affiliate or other entity controlled by George Johnson?

Response: Yes.

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1.16. If the answer to Question 1.15 is "yes" for any month, what rate did the affiliate pay for the treated effluent during that month? Please substantiate your response with copies of bills, together with cancelled checks or other evidence of payment.

Response: Johnson Utilities delivers effluent from its Section 11 WRP to a storage facility on the golf course ("Oasis Golf Course") at The Club at Oasis ("Oasis") pursuant to an Effluent Storage and Distribution Lease ("Effluent Storage Lease") dated January 1, 2006. The Oasis is an affiliate of Johnson Utilities. The Section 11 WRP generates effluent which exceeds the demand for effluent in the vicinity of the Section 11 WRP. The Effluent Storage Lease allows Johnson Utilities to deliver effluent from the Section 11 WRP to the Oasis Golf Course which exceeds the golf course's demand for effluent. Thus, at certain times effluent overflows the storage facility at the Oasis Golf Course and the course must be closed for business.

Johnson Utilities has discovered that it was not charging the Oasis Golf Course for the effluent the golf course was receiving. The golf course should have been charged a minimum for the effluent delivered. Johnson Utilities will be addressing this oversight in its rate case filing with an appropriate adjustment.

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-000141 05/27/2008

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

JOHNSON UTILITIES L L C

PATRICK J VAN ZANEN

v.

SWING FIRST GOLF L L C, et al.

CRAIG A MARKS

MINUTE ENTRY

The Court has considered Defendants' Motion To Dismiss and the briefs. The Court finds and rules as follows.

The action before the Corporation Commission predated the filing of the Complaint here. With respect to the contract claims as pled, this case appears not to be a failure-to-pay case as argued by Johnson. Golf West's Amended Formal Complaint filed with the Commission appears to allege that Swing First failed to pay the amounts Johnson demanded and did so because it believed those amounts to be in excess of that provided by the rates fixed by the Corporation Commission. The "charge for, nature, and quality" of the regulated water service provided by Johnson is thus the issue, unlike the situation in *Qwest Corp. v. Kelly*, 204 Ariz. 25, 33 (App. 2002), and *Campbell v. Mountain States Telephone & Telegraph Co.*, 120 Ariz. 426, 432 (App. 1978). Regardless of whether this Court has concurrent jurisdiction, the Court is of the opinion that it should refrain from becoming involved until the Corporation Commission has made its initial determination. *See Campbell, supra* at 430-31.

As for the defamation and related claims, a Rule 12(b)(6) motion is not the place to argue whether Johnson is a public figure, and the consequences of whichever ruling the Court

eventually makes. The legal issues should await further motion practice with a more fully-developed record.

Therefore, IT IS ORDERED denying Defendants' Motion To Dismiss without prejudice.